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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GORDON STRUBE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, contrary to the decisions of several Courts of Appeals, the court below correctly held that the Government need not comply with the literal terms of plea agreements which it enters even where the defendant, upon the Government's breach, moves to withdraw his plea prior to sentencing.

2. Whether the Government may, consistently with *Santobello* v. *New York*, 404 U.S. 257 (1971), purport to cure its breach of a plea agreement after the defendant, prior to sentencing, has sought to avail himself of his presumptive constitutional right to withdraw his plea and put the Government to its proof at trial.

3. Whether, as all federal courts having considered the issue other than the court below have concluded, a defendant charged with being an accessory after the fact under 18 U.S.C. § 3 may not be convicted unless, to support that charge, he committed overt acts subsequently to the completion of the underlying offense.

4. Whether this Court should permit a conviction to stand when all counsel and the federal courts below failed to recognize that the facts alleged in the information and upon which the conviction was obtained do not, as a matter of law, support conviction for the offense charged.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-

GORDON STRUBE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner, Gordon Strube, respectfully petitions for the issuance of a writ of certiorari to review the judgment of the court below under which he was not permitted to withdraw his guilty plea prior to sentencing notwithstanding a breach by the Government of the plea agreement. Petitioner also seeks review of the judgment below which, contrary to the positions taken by other federal courts, applied the federal "aiding and abetting" statute, 18 U.S.C. § 2, and the federal "accessory after the fact" statute, 18 U.S.C. § 3, in such a way as to render them fungible by affirming his conviction for violating § 3 on the basis of facts that would only have sustained a violation of § 2 for which petitioner was never charged and to which he did not plead guilty.

OPINIONS AND ORDERS BELOW

The initial, unpublished memorandum opinion of the Ninth Circuit, filed on October 11, 1989, affirming the District Court's judgment of conviction is reproduced in App. A, 1a-11a. The unpublished January 23, 1990 order of the court below issued in response to petitioner's rehearing petition, which amended the October 11, 1989 opinion, denied rehearing and rejected the *en banc* suggestion, is reproduced in App. B, 12a-13a. The October 11, 1989 opinion as modified by the January 23, 1990 order is reproduced in App. C, 14a-24a. The District Court issued no opinion with respect to its denial of petitioner's Rule 32(d) motion to withdraw his guilty plea; that court's oral explanation for its decision rendered at the August 15, 1988 hearing on that motion is reproduced in App. D, 25a-28a. The District Court's judgment and probation/commitment order issued August 16, 1988 is reproduced in App. E, 29a-31a.

JURISDICTION

The District Court's jurisdiction over this case arose under 18 U.S.C. § 3231. The Ninth Circuit's jurisdiction over the appeal arose under 28 U.S.C. § 1291. This petition is being filed within ninety days of the January 23, 1990 order denying petitioner's rehearing petition. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Due Process Clause of the Fifth Amendment provides, in pertinent part:

> No person shall . . . be deprived of . . . liberty, or property, without due process of law . . . .

2. Rule 32(d) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> If a motion for withdrawal of a plea of guilty . . . is made before sentence is imposed . . . the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason.

3. The federal "accessory after the fact" statute, 18 U.S.C. § 3, provides:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment is an accessory after the fact.

STATEMENT OF THE CASE

A. Statement of Facts Relevant to the Withdrawal Questions and the Decision of Those Questions by the Courts Below

Petitioner is the founder, acting president, and chief executive of Consolidated Aeronautics Corporation (CAC), an entity which sold aircraft parts to the Government during 1985 and 1986. In 1987, the United States Attorney's Office in Los Angeles began an investigation of CAC and four of its employees for violations of 18 U.S.C. § 287 (false claims), and 18 U.S.C. § 1001 (false statements). Petitioner was not an object of that investigation. Nonetheless, in early March 1988 he decided "to see whether I could voluntarily come forward and plead guilty to some offense in order to prevent the indictment of as many of my colleagues as possible." App. C, 15a.

On March 11, 1988, petitioner, CAC and a CAC employee entered a verbal plea agreement with the Government. On March 25, 1989, the Government filed an information, reproduced in App. F, 32a-38a, charging the three defendants with various violations of federal law. Petitioner was named in Counts Two, Three and Five of

that information which, in essentially the same language, charged that he had, with knowledge that the charged underlying offenses had been committed by the other defendants, "received, relieved, comforted and assisted [the other defendants] in order to hinder and prevent their apprehension, trial and punishment" in violation of 18 U.S.C. § 3.

On April 11, 1988, petitioner (and the other defendants) and the Government entered a written plea agreement, reproduced in App. G, 39a-45a, in which petitioner agreed to plead guilty to those same three counts of violating 18 U.S.C. § 3. The plea agreement stated that petitioner could be sentenced to a maximum of 2.5 years of imprisonment on each count and fines totalling $625,000. In the plea agreement, the Government stated that, "[a]s to [petitioner], the government will not recommend at the time of sentencing a total period of incarceration of more than one year." App. G, 40a. Petitioner, CAC and its employee entered their guilty pleas at a hearing before the District Court on May 9, 1988. At that hearing, the court pointed out—after explaining to the defendants the substantial constitutional rights each was waiving by pleading guilty—"that the Government has agreed not to make certain recommendations at the time of sentencing . . . ." App. H, 58a.

Despite the Government's commitment in the plea agreement not to recommend a total sentence of more than one year for petitioner, the Government's sentencing memorandum filed in the District Court on July 20, 1988, reneged on that commitment. In that memorandum, the pertinent parts of which are reproduced in App. I, 70a-73a, the Government stated in the "Introduction" section that it was recommending for petitioner "[a] jail sentence of one year and a fine of $625,000." In that part of the memorandum titled "Recommendations," however, the Government took a different position:

> It is submitted that CAC's long ingrained practice of selling defective parts was known to and orchestrated by STRUBE. But for his age and health, a long prison sentence would be called for. Nevertheless, some prison is warranted to deter STRUBE and other corporate executives who attempt to hide behind their employees. *The government submits that STRUBE should be sentenced to a prison term of at least one year.* The government has been advised that the Terminal Island prison in this district has adequate facilities to deal with STRUBE's health problems.

App. I, 73a (emphasis added).

Based upon his view that only one reasonable inference could be drawn from the words "at least one year"—that the Government was recommending a minimum sentence of one year and necessarily was encouraging the District Court to impose a greater sentence—in violation of the Government's promise in the plea agreement—petitioner moved in the District Court on August 8, 1988 to withdraw his guilty plea pursuant to Fed. R. Crim. P. 32(d). Under that rule, a defendant is to be permitted to withdraw a guilty plea if he shows a "fair and just reason" for doing so.

In opposing petitioner's motion to withdraw his plea, the Government acknowledged that it was not permitted to recommend more than a one-year jail term under the plea agreement. Furthermore, the Government did not suggest that the only reasonable interpretation to be given to its own language—"at least one year"—was precisely as petitioner contended and as any other reasonable person should have interpreted that language. Rather, the Government, conceding that those words were "ill-chosen," attempted to belittle the dispute as "one of semantics" and pointed out that it had offered to delete that ill-chosen language from its sentencing memorandum. The Govern-

ment asserted that its inclusion of that language "should not be seen for something it was not." As the Government stated, it "did not intend to breach the agreement or ask for a higher sentence" by using the words "at least one year" in its sentencing memorandum. The Government also asserted that it would be prejudiced if petitioner were permitted to withdraw his plea.

Apparently agreeing with the Government that the Government's *post hoc* statement of its *subjective* intent in using the language "at least one year" was decisive of petitioner's right to withdraw his plea at that point, the District Court, expressly taking into account the Government's "intentions" as articulated *after* the sentencing memorandum was filed and *after* petitioner had moved to withdraw his guilty plea, stated at the hearing on the withdrawal motion that

> in a certain sense [petitioner's argument] is a semantic argument because if [the Government] said [the petitioner] should be sentenced to a prison term of one year it amounts, I think, to the same thing if you say "at least one year." I think [the language "at least one year"] acknowledges that while [the Government] can't recommend more, [the Government] is going to recommend one year. That is what I believe and that is the way I interpreted it . . . .

App. D, 28a.

With respect to the remedy of withdrawal sought by petitioner, the District Court expressed the view that "at best [petitioner is] entitled to sentencing before a different judge without . . .the word[s] 'at least', in the [sentencing] memorandum before the judge." He went on to state his view that *Santobello* v. *New York*, 404 U.S. 257 (1971), "doesn't say—none of those cases say that, the Ninth Circuit doesn't say that you are entitled to withdraw the plea." App. D, 27a. The District Court did not discuss the

Government's prejudice argument. After denying petitioner's Rule 32(d) motion, the court proceeded at that same hearing to sentence petitioner to imprisonment for two years, the execution of which was stayed on the condition that petitioner serve six months in a community treatment center. The court also imposed a fine of $300,000, ordered petitioner to perform 1,000 hours of community service and placed petitioner on probation for five years. App. E., 30a.

In the Court of Appeals, the Government once again did not defend its use of the language "at least one year." Nor did the Government expressly take the position that petitioner's interpretation of that language was the only reasonable interpretation that language would bear. Instead, the Government observed:

> By the use of such a term, the district court found that government did not intend to breach the agreement or ask for a higher sentence. The use of the words "at least" simply were not viewed by the district court as seeking a sentence greater than one year . . . .

Br. of the United States, at 19. In short, the Government took the position that it had not *intended* to breach the agreement and that the District Court had concluded as much.

With regard to the remedy issue, the Government argued to the Ninth Circuit that even if the Government had violated the plea agreement by its use of the language "at least one year," petitioner would in any event only be entitled to specific performance by the Government rather than a right to withdraw his plea. Br. of United States, at 21. Under the Government's submission, it apparently viewed its offer to withdraw the words "at least" as constituting *post hoc* "specific performance" sufficient to override petitioner's right to withdraw his plea and stand trial. The Government also renewed its contention,

unaddressed by the District Court, that allowing petitioner to withdraw his plea would result in prejudice to the Government.

The Court of Appeals, in a memorandum opinion issued on October 11, 1989, concluded that the words "at least one year" were in "substantial compliance with the terms of the [plea] agreement" and that the "recommendation" of the Assistant United States Attorney ("AUSA") "as modified orally prior to sentencing did not violate the plea agreement." App. A, 10a-11a. In apparent recognition of the force of petitioner's argument in his Petition for Rehearing that anything less than literal performance by the Government of its obligations under a plea agreement would not suffice to sustain a conviction based upon a plea bargain, *e.g.*, *United States* v. *Benchimol*, 738 F.2d 1001, 1004 (9th Cir. 1984) (Wallace, J., dissenting) ("performance of a plea bargain requires the government to convey the promised recommendation to the sentencing judge without qualification"), *rev'd mem.*, 471 U.S. 453 (1985), the Court of Appeals issued an order on January 23, 1990 in which it struck the "substantial compliance" language from its initial opinion and inserted in its place as follows:

> Thus, the prosecutor made clear in his statement to the court prior to sentencing that the government intended to rely on the terms of the plea agreement. The district court construed the prosecutor's recommendation, as clarified by his oral statements, as being in compliance with the terms of the plea agreement.

App. B, 12a-13a. Noticeably missing from this statement or the balance of the Ninth Circuit's opinion is any assertion that the language "at least one year" did not mean what petitioner said it must mean or, correspondingly, that the Government had not in fact breached its promise by the use of the language "at least one year" in its sentencing memorandum.

In rewriting its prior conclusion, the Court of Appeals deleted the "as modified by" language from its October 11 opinion and stated:

> "Good faith disputes of the parties as to the terms of a plea agreement are to be resolved by the district court in which the plea was originally submitted." *United States v. Bornstein*, 623 F.2d 1327, 1330 (9th Cir. 1980). The district court fully explored the intent of the parties concerning the terms of the plea agreement before pronouncing sentence. The district court concluded that under the terms of the plea agreement the prosecutor could not recommend more than one year, but was free to argue that the sentence should not be less than one year. The district court's interpretation of the intent of the parties was not clearly erroneous.

App. B, 13a. Once again, the Court of Appeals failed to contradict in any way petitioner's assertion that as of the filing of the Government's sentencing memorandum, the plain language of that memorandum constituted a breach of the plea agreement. In essence, the Court of Appeals deferred to the District Court's interpretation of the "intent" of the parties regarding the plea agreement without itself confronting the inescapable conclusion that the Government's use of the language "at least one year" constituted a material breach of the Government's promise not to recommend a sentence of more than one year.

B. Statement of Facts Relevant to the Accessory After the Fact Questions

Petitioner pled guilty to three counts of violating 18 U.S.C. § 3 as an accessory after the fact to violations by his company and an employee of his company of 18 U.S.C. § 1001 (submitting a false certification to the government) and 18 U.S.C. § 287 (presenting false claims for payment). The criminal information charging those offen-

ses alleged that "on or about" three specific dates—April 9, 1985, April 4, 1986 and March 20, 1986—CAC and its employee had violated 18 U.S.C. §§ 287 & 1001. App. F, 35a-38a. The information also alleged as to petitioner that "[a]*t said time and place*, [petitioner] received, relieved, comforted and assisted [the other defendants] in order to hinder and prevent [their] apprehension, trial and punishment in violation of 18 U.S.C. § 3." App. F, 35a-38a. Thus, on its face the information charged petitioner as an accessory *after the fact* on the basis of his alleged commission of acts occurring at the same time as the underlying substantive offenses for which the other defendants were charged.

Petitioner's plea was taken on May 9, 1988 at the same hearing at which CAC and its employee pled guilty as principals to the underlying substantive offenses. At that hearing, petitioner's counsel made clear to the court that petitioner was pleading only to being an accessory after the fact. *See* Transcript of May 9, 1988 Hearing, App. H, 53a-54a. After accepting the defendants' pleas, the District Court, attempting to fulfill its responsibility under Fed. R. Crim. P. 11(f), asked the AUSA to set forth the factual basis for the pleas. The AUSA devoted most of his statement of facts to those supporting the pleas of CAC and its employee to the substantive offenses. At the outset, he stated that the offenses involved in the plea were part of a conspiracy which was "active during the time period of about at least 1984 and '85 through October 31st, 1987." With respect to the facts he thought to establish a basis for petitioner's plea to accessory after the fact to violations of 18 U.S.C. § 1001, the AUSA stated only that petitioner

> knew what was going on *at the time* and did nothing to stop this particular pattern; indeed, [his employees were] assisted by lack of action and lack of intent to put an end to this particular path and, therefore, in the government's view, could be found guilty of 18 USC Section 3 in

> conjunction with the false statement [alleged in Count Two of the Information].

App. H, 63a (emphasis added). The AUSA relied on that same factual assertion to support the Government's case against petitioner under Counts Three and Five. App. H, 64a.

Following the AUSA's statement, petitioner's counsel stated to the court that petitioner learned of the misdeeds of the other CAC employees "in early 1986 [and] failed to bring them to the attention of the authorities . . . ." On that basis, counsel advised the court of his legal conclusion that a factual basis existed to convict petitioner for violating 18 U.S.C. § 3. App. H, 66a.[1]

The District Court then asked the AUSA whether he believed the facts as elaborated upon by petitioner's counsel constituted a violation of 18 U.S.C. § 3. After petitioner's counsel made clear that the gravamen of petitioner's offenses was his failure "to come forward to authorities" upon learning of the misconduct of his employee, the AUSA

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[1] At the May 9, 1988 hearing, respective counsel for all three defendants also jointly submitted a written paper entitled "Defendants' Factual Basis for Guilty Plea to Information." The statements in that paper regarding the factual basis for petitioner's plea were consistent with the discussion of the facts at the May hearing. The relevant paragraph reads as follows:

> In approximately January 1986 and later, Mr. Strube learned from other officers of CAC who had primary responsibility for the U.S. Government contracting business that CAC had supplied "newly manufactured material" to the government in connection with certain "selector set" contracts even though the contract specifications called for the material to be "new, unused surplus." Further, Mr. Strube learned at that time that certifications had been submitted to the government by CAC personnel which falsely affirmed that the product supplied was "new, unused surplus," when, as Mr. Strube learned after the fact, the product was "newly manufactured" material. (This applies to the contracts referred to in counts two, three and five of the Information.)

stated his belief that those facts supported a violation of § 3. App. H, 68a. The District Court accepted this proffer as a sufficient factual basis for a violation of 18 U.S.C. § 3. App. H, 69a.

On appeal, petitioner contended that the District Court had failed to establish a factual basis for his guilty plea as required by Rule 11(f) because it had "received absolutely no facts whatsoever to demonstrate that [petitioner] ever committed an affirmative act" to assist CAC or its employee in concealing their violations. Reviewing this issue *de novo*, the Court of Appeals acknowledged that, to establish a factual basis for a violation of 18 U.S.C. § 3, the District Court must have had a basis for concluding: (1) that the underlying offense occurred; (2) that petitioner had knowledge thereof; and (3) that petitioner comforted or assisted the offender "in order to hinder or prevent his apprehension, trial or punishment." Noting that petitioner had conceded the first two elements, the Court of Appeals found that petitioner had committed the following acts which that court viewed as "affirmative":

- petitioner "concealed from the government the fact that his employees were continuing to file false claims";
- petitioner "permitted his employees to continue to file false claims";
- petitioner allowed "the pattern of presenting false claims" to continue with his knowledge; and
- petitioner provided a "safe harbor for the criminal action and conceal[ed] their ongoing crimes for personal or corporate profit."

On the basis of its review of the record, the Court of Appeals concluded that petitioner "comforted and assisted

his employees in continuing to file false claims after he had knowledge of their prior illegal activity." App. C, 21a.

It is beyond dispute that under the facts as found by the Ninth Circuit, the acts of petitioner relied upon by that court to support petitioner's conviction for violating § 3 were committed *during* the commission of the underlying substantive offenses. Not so much as a single act was found by the Court of Appeals to have been committed which could have been committed by petitioner *after* the completion of the underlying offenses. Because petitioner pled guilty to three counts of being an accessory after the fact, the Court of Appeals necessarily, if unwittingly, found that assistance rendered during the commission of a crime constitutes a violation of 18 U.S.C. § 3.

REASONS FOR GRANTING THE WRIT

As demonstrated below, the questions upon which petitioner seeks review are frequently recurring and have divided the lower federal courts. Thus, they warrant plenary review by the Court in this case. In any event, the conviction cannot stand because the conduct charged is not, as a matter of law, made punishable by the provision of the *United States Code* for which petitioner was convicted.

A. The Question Whether the Government Must Comply with the Literal Terms of a Plea Agreement Is an Important and Recurring Question Upon Which the Courts of Appeals Are Divided

In the courts below, the Government—with a cavalier flair—characterized petitioner's demand to withdraw his guilty plea prior to his sentencing as a "dispute over semantics." That characterization is not inapt; the Government's cavalier attitude towards petitioner's claim, however, betrays the Government's insensitivity to the central importance of all language used in plea agree-

ments. In *Santobello* v. *New York*, 404 U.S., at 262, this Court stated, as a constitutional imperative, that, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Promises are, of course, made through the use of language.

In this case, the Government itself has never directly disputed petitioner's contention that the language "at least one year" is susceptible to only one reasonable interpretation—that the AUSA was communicating to the District Court the message that the Government would be pleased to see a sentence of greater than one year imposed on petitioner. Nor did the Court of Appeals contradict petitioner's interpretation of that language which, read in isolation and in the context of the paragraph of the sentencing memorandum in which it appeared, *see* p. 5 *supra*, cannot reasonably be read as other than a breach of the Government's written promise regarding possible sentences it would *not* recommend to the District Court.

Following the teaching of *Santobello*, the Courts of Appeals for the Third, Fifth, Seventh and Eleventh Circuits have insisted that the Government abide by the literal terms of a plea agreement. Thus, in *United States* v. *Crusco*, 536 F.2d 21, 26 (3d Cir. 1976), the Third Circuit ruled that the District Court had erred by failing to allow the defendant to withdraw his plea after the Government failed strictly to adhere to the terms of a plea agreement.[2] In that case, the Government had agreed to take no position on sentencing. *Id.*, at 23. At the sentencing hearing, the Government expressly stated that it was "leaving the sentencing decision to the judge," but then proceeded to portray the defendant as an important figure in organized

[2] The court also ruled in the alternative that the defendant justifiably misunderstood the maximum sentence to which he would be subject by pleading guilty. *Crusco*, 536 F.2d, at 24-25.

crime and a danger to the community. *Id.*, at 25. The Court of Appeals ruled that this characterization of the defendant was "a transparent effort to influence the severity of [the defendant's] sentence" in violation of the Government's promise to take "no position" on sentencing. *Id.*, at 26. The Third Circuit concluded:

> The Government, therefore, must also clearly understand the scope and depth of its commitment and the need for precision in plea bargaining. It may reach port in the plea bargaining process but founder there because of careless or loose language in its commitment. Once it makes a promise, *Santobello* requires strict adherence.

Id. See also United States v. *Moscahlaidis*, 868 F.2d 1357, 1361-63 (3d Cir. 1989) (comments about character by Government violated agreement to take no position regarding whether to impose custodial sentence).

The Fifth Circuit has similarly interpreted the requirements of *Santobello*. In *United States* v. *Grandinetti*, 564 F.2d 723 (5th Cir. 1977), the Government had agreed, *inter alia*, to make certain sentencing recommendations at the defendant's probation revocation hearing. *Id.*, at 725. At that hearing, however, the Government stated that it had "very serious problems" with the promised sentencing recommendation, and that it was unsure of the "legality" and "propriety" of the sentencing agreement. *Id.* The Fifth Circuit considered "simply whether the plea bargain agreement has been breached or not—irrespective of prosecutorial justifications for the failure in performance." *Id.*, at 727. On this basis, that court ruled that the Government had violated the plea agreement because it not only was "an unpersuasive advocate"[3] for the agreement but had,

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[3] In *United States* v. *Benchimol*, 471 U.S. 453 (1985), this Court held that when the Government agrees to make a sentencing recommendation, it is under no obligation to do so "enthusiastically." In so

"in effect, argued against it." *Id.*; *see also United States* v. *Avery*, 450 F.2d 214, 216 (5th Cir. 1980) (noting that the Government must "adhere strictly to the terms and conditions of the plea agreement" but ruling that the Government did not violate agreement by providing information on defendant to the probation officer).

A like approach also has been adopted by the Seventh Circuit. In *United States* v. *Bowler*, 585 F.2d 851 (7th Cir. 1978), the Government had promised that its recommendation "may be reduced, based upon" its assessment of the defendant's health, his cooperation, and the Antitrust Division's sentencing guidelines under which, in some circumstances, fines could be substituted for imprisonment. *Id.*, at 853, 854. The court found that this constituted a promise by the Government "to undertake a good faith analysis" of these factors in formulating its sentencing recommendation. The court determined that such considerations by the Government must be reflected in the record of the lower court proceedings. *Id.*, at 855. Ruling that the Government must be held to "[s]trict fulfillment of prosecutorial promises," *id.*, at 853, and finding no consideration of the defendant's health or of the Antitrust Division's guidelines reflected in the Government's presentation to the District Court, the Court of Appeals ruled that the Government had breached the plea agreement. *Id.* Underlying this holding was the recognition by the

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holding, the Court expressly distinguished *Grandinetti*. *Id.*, at 456. On its facts, *Benchimol* could have presented a challenge to the Government's fulfillment of its obligations under the plea agreement similar to that advanced by petitioner. In that case, the Government's sentencing memorandum had incorrectly stated that the Government would remain silent as to the sentence, whereas the Government had agreed to recommend probation with restitution. The defendant's own counsel pointed out that mistake at the sentencing hearing and corrected it. Five years later, the defendant brought a collateral attack on his conviction in which he once again made no argument that at the time of his sentencing he should have been entitled to withdraw his plea based upon the Government's literal breach of its plea agreement.

Seventh Circuit that "to protect the plea bargaining defendant from overreaching by the prosecutor and to insure the integrity of the plea bargaining process, the 'most meticulous standards of both promise and performance must be met by prosecutors engaging in plea bargaining.' " *Id.*, at 854, *quoting Correale* v. *United States*, 479 F.2d 944, 947 (1st Cir. 1973).

The Eleventh Circuit has required similar strict compliance by the Government with all promises it makes to induce a guilty plea, even if some of those promises are made orally and are not reflected in the written plea agreement. *In re Arnett*, 804 F.2d 1200 (11th Cir. 1986). In *Arnett*, the "forfeiture" provision of the written plea agreement indicated that it was "the entire agreement" between the parties; it stated only that the defendant agreed to forfeit $3,000 to the Government. *Id.*, at 1202. Furthermore, at the plea hearing the defendant stated that this written agreement contained all promises made by the Government. *Id.* The Government also had orally stated that it had "no interest" in the defendant's farm. *Id.* Finding that this oral statement constituted a part of the inducement to plead guilty and ruling that *Santobello* requires "that the government adhere strictly to the terms of plea agreements," the court held that the government had breached the agreement by attempting to gain forfeiture of the defendant's farm. *Id.*, at 1204.

It is evident from these cases that the decision below cannot be reconciled with those of the Courts of Appeals which have insisted that the Government must be in literal compliance with all material terms of a plea bargain agreement. This Court should grant review in this case in order to establish uniformity on this important and frequently recurring question.

B. The Court of Appeals' Acceptance of the Government's Attempts to Cure Its Breach of the Plea Agreement Deprived Petitioner of Due Process under *Santobello* v. *New York*

In its initial opinion, the Court of Appeals made quite clear that it was sustaining petitioner's conviction on the basis of its conclusion that, after petitioner had brought his Rule 32(d) motion to withdraw his plea but before sentencing, the Government had modified the sentencing recommendation contained in its sentencing memorandum so that the recommendation upon which petitioner was sentenced was, in a temporal sense, consistent with the Government's promise in the plea agreement. As the court stated, "[w]e agree with the district court that the prosecutor's recommendation *as modified orally* prior to the sentencing did not violate the plea agreement." App. A, 11a. (emphasis added). This conclusion is well supported by the Government's own position before the courts below. For example, in its opposition to petitioner's motion to withdraw his plea, the Government stated that "a one year jail term is the maximum [the Government] is able to and does ask for" and relied on its offer "to delete those two words ["at least"] from the Sentencing Memorandum."

On rehearing, the Court of Appeals appeared to retreat from the words "as modified orally." Where those words had previously appeared, the court substituted language the gist of which is that this was a problem for the District Court to resolve and that that court's "interpretation of the intent of the parties was not clearly erroneous." App. C, 24a. Elsewhere in its modified opinion, however, the Court of Appeals indicated that its affirmance was based upon the fact that "[t]he district court construed the prosecutor's recommendation, as clarified by his oral statements, as being in compliance with the terms of the plea agreement." App. C, 23a.

There is little doubt that the initial decision of the Court of Appeals, on its face, constituted a flagrant violation of *Santobello* v. *New York*. In *Santobello*, an inadvertent breach of a plea agreement had resulted from a change in personnel, with the "new" prosecutor making a sentencing recommendation that violated a plea agreement on sentence recommendation that had been reached by the former prosecutor and the defendant. In this Court, all seven of the Justices participating in the decision were of the view that whether the sentencing judge was or was not influenced by the prosecutor's recommendation was irrelevant to whether a violation of due process had occurred. 404 U.S., at 262.

The necessary holding of *Santobello* is that the Government cannot "cure" its violation of a plea agreement by subsequently modifying a sentencing recommendation made in breach of that agreement. This is so because if the Government could qualify or modify its formal, written recommendation, testing the constitutionality of the conviction would *require* an appellate court to determine whether the trial court was influenced by the initial, breaching recommendation.

Viewing the concurring opinion of Justice Douglas in *Santobello* as controlling the holding of *Santobello*, petitioner's contention becomes even more sharply focused. As the "glossator," *see McKoy* v. *North Carolina*, 110 S. Ct. 1227, 1243-44 n.3 (1990) (Scalia, J., dissenting), Justice Douglas expressed his view that as a matter of due process, a defendant has a presumptive right to withdraw his plea upon the failure of the Government to honor its plea bargain. 404 U.S., at 267. Justice Marshall, joined by Justices Brennan and Stewart, agreed that "where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sen-

tence and judgment." 404 U.S., at 267-68 (Brennan, J., concurring in part and dissenting in part).

Under the opinions issued in *Santobello*, it is abundantly clear that the Government's failure to live up to its promise regarding its sentencing recommendation gives rise to a presumption in favor of the defendant's ability to withdraw his plea and reclaim his right to a trial if he moves promptly to do so. Any other understanding of *Santobello* would destroy its holding. In this case, the Court of Appeals beat a hasty retreat, but the "as clarified" language chosen on rehearing cannot be reconciled with *Santobello*. It may be that the AUSA in this case adequately "clarified" his personal, subjective intent in using the words "at least." The Government may not, however, put the sentencing court in the position of being exposed to an illicit, breaching sentence recommendation. In short, under *Santobello* the AUSA had to get it right the first time.

Whether viewed through the prism of due process, an aspect of this Court's supervisory power over the federal courts, *see id.*, at 266-67 (Douglas, J., concurring), or an aspect of the proper interpretation of Rule 32(d) of the Federal Rules of Criminal Procedure,[4] this Court should grant certiorari to clarify for all participants in the plea bargaining process whether prosecutors may, with impunity, send to the sentencing judge the very signal which the pleading defendant bargained to avoid and then prevent withdrawal through the judicial legerdemain that occurred here.

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[4] Under Rule 32(d), a defendant is permitted to withdraw a guilty plea simply by showing a "fair and just reason" for his request. Under the decision below, the Court of Appeals has construed and applied Rule 32(d) in an unconstitutional fashion, thereby providing a separate basis for this Court's grant of certiorari in this case.

C. The Court of Appeals' Judgment Obliterates the Distinction Between the Accessory After the Fact Statute and the Aider and Abettor Statute and Conflicts With Other Federal Court Decisions[5]

Many federal courts have held that to be guilty of violating 18 U.S.C. § 3, a defendant must comfort or assist the offender *after* the commission of the underlying crime. If, however, a defendant rendered assistance to the principal offender during the commission of an offense, the defendant must be considered an aider and abettor in violation of 18 U.S.C. § 2, rather than an accessory after the fact in violation of 18 U.S.C. § 3.

The fundamental point of law at issue has been articulated many times. In *United States* v. *Barlow*, 470 F.2d 1245 (D.C. Cir. 1972), the defendant was charged and convicted as an aider and abettor to the crime of theft of government property in violation of 18 U.S.C. § 641. On

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[5] As indicated in the Statement of Facts, *supra*, counsel for petitioner and the Government, as well as the Ninth Circuit, considered the question whether petitioner's conviction for violation of 18 U.S.C. § 3 should stand primarily as involving whether there was a factual basis in the record to show that petitioner had committed an "affirmative" act as distinct from merely omitting to report violations of federal law to appropriate authorities upon his discovery of them. In the Ninth Circuit, petitioner and the Government disagreed over how early in the conspiracy alleged in Count One of the information (not involving petitioner) petitioner became aware of the misconduct of other CAC employees. Neither petitioner nor the Government, however, noted the fatal defect in the criminal information. Petitioner acknowledges that Question 3 was not, in terms, sharply framed by the parties in the Court of Appeals, in part because it arose only after the Court of Appeals determined, contrary to petitioner's submission, that the record supported the proposition—otherwise necessary to sustain his conviction—that petitioner committed an "affirmative" act. While this Court has jurisdiction over Question 3, petitioner recognizes that plenary consideration of it in this posture may be undesirable and therefore asks the Court in part D below to vacate the judgment and remand the case for reconsideration in light of the defect in the criminal information.

appeal, he argued that the evidence was insufficient to show that he aided and abetted the larceny and that the most the evidence showed was that he was an accessory after the fact to the larceny. The court disagreed with that factual contention but went on to explain the distinction at issue in this case:

> The gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime. . . . The very definition of the crime also requires that the felony not be in progress when the assistance is rendered. . . .

Id., at 1252-53.

In *United States* v. *Balano*, 618 F.2d. 624 (10th Cir. 1979), the defendant appealed his conviction as an accessory after the fact to interstate transportation of stolen coins by two co-defendants. The evidence at trial showed that after the co-defendants had stolen the coins, they had crossed a state line and had come to the defendant's office, where he had provided the co-defendants with clothes, a suitcase, a bathroom and a razor so that one of the co-defendants could change his appearance. The defendant argued on appeal that the two co-defendants were still in the escape phase of their crime when they came to his office and thus he could only be convicted for violation of 18 U.S.C. § 2.

In considering that claim, the Tenth Circuit explained the "escape phase" doctrine as having been "developed to deal with those who are entangled in the consummation of the crime itself. . . . In contrast, accessories after the fact 'obstruct justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime.' " *Id.* at 631, *quoting United States* v. *Barlow*, 470 F.2d at 1253. Upon examination of the record, the Tenth Circuit concluded that the "escape" phase of the

co-defendants' crime had come to an end by the time they reached the defendant's office and on that basis affirmed the conviction. In sharp contrast, the Court of Appeals here found that petitioner had assisted the company and its employee during the commission of their offenses, but nevertheless sustained petitioner's conviction as an accessory after the fact.

Other courts have applied this rule to overturn convictions for being an accessory after the fact where those convictions were based on assistance given during the commission of a crime. In *United States* v. *Nava-Maldonado*, 566 F. Supp. 1436 (D. Nev. 1983), the defendant had been arrested while transporting illegal aliens. He was ultimately convicted at trial of being an accessory after the fact to the transportation of illegal aliens. After verdict, he moved for a judgment of acquittal. The court granted the motion, holding that the defendant could not be convicted of being an accessory after the fact to transporting illegal aliens because the substantive crime of transporting illegal aliens was not complete at the time the acts charged against him were committed. "One who is an accessory after the fact assists an offender after the latter has already committed a crime; the assistance is for the purpose of hindering or preventing the apprehension or punishment of the offender. The assistance given by the accessory after the fact is not in connection with the commission of the crime by the offender." *Id.*, at 1438. In this case, "[t]he prerequisite that the substantive crime already have been committed was not satisfied." *Id.*, at 1439. The facts as found by the Court of Appeals establish that petitioner's acts upon which the plea was taken all occurred *before* the completion of the underlying offenses.

The Third Circuit has also held that the offense of accessory after the fact can occur only after the substantive crime has been committed. *See Government of Virgin Islands* v. *Aquino*, 378 F.2d 540, 553 (3d. Cir. 1967). Being an accessory after the fact "does not relate to assistance

in the commission of the crime, but rather to assistance rendered the offender in order to hinder or prevent his apprehension or punishment after he has already committed an offense." *Id. See also United States* v. *McCoy*, 721 F.2d 473, 475 (4th Cir. 1983). Other cases make clear that assistance rendered during the commission of a crime is a violation of 18 U.S.C § 2 rather than a violation of 18 U.S.C. § 3. *See, e.g., United States* v. *York*, 578 F.2d 1036 (5th Cir. 1978); *United States* v. *Willis*, 559 F.2d 443 (5th Cir. 1977); *United States* v. *Jarboe*, 374 F. Supp. 310 (W.D. Mo. 1974), *aff'd*, 513 F.2d 33 (8th Cir. 1975). In contrast, the Court of Appeals affirmed petitioner's conviction on the basis of acts of, or assistance provided by, petitioner *while* CAC employees were allegedly committing the underlying substantive offenses.

The reasoning and results reached in other cases involving the principle that aid rendered after the commission of an offense does not violate 18 U.S.C. § 2 are equally called into question by the decision in the case at bar. In one such case, the defendant had been convicted of aiding and abetting his girlfriend, an employee of a federally insured savings and loan association, in her embezzlement of $19,575. *See United States* v. *Ferraro*, 414 F.2d 802 (5th Cir. 1969). On the particular day in question, the girlfriend carried away the money from the bank. The defendant picked her up in his car and drove to their home, where she told him what she had done. They then planned an escape. There was no evidence to indicate, however, that the defendant had known or planned with his girlfriend to steal the money. On appeal, the court squarely held that the evidence was insufficient to find the defendant guilty of aiding and abetting; at most, he could have been convicted as an accessory after the fact, because the underlying offense was complete when the girlfriend walked out of the bank with the money in her possession. *Id.*, at 804.

In a similar case, *Roberts* v. *United States*, 416 F.2d 1216 (5th Cir. 1969), the defendant was convicted of aiding and abetting the substantive offense of passing a counterfeit $20 bill at a particular drug store. The defendant and her friend had gone into the drug store and the friend, who had paid with a counterfeit bill, was arrested immediately. At that point, the defendant took the rest of the counterfeit bills from her friend, left the drug store and burned them. On the basis of this evidence, she was convicted as an aider and abettor. On appeal, the Fifth Circuit held that a person cannot aid or abet a crime which has already been committed. In that case, the passing of the counterfeit bill had been completed at the time the defendant destroyed the other counterfeit money. While the defendant could have been charged and possibly convicted as an accessory after the fact, she could not be convicted as an aider and abettor. *Id.*, at 1221. The Court of Appeals in this case reached the opposite result by upholding petitioner's conviction as an accessory after the fact on the basis of a factual record that could arguably support only a conviction for aiding and abetting. Under this decision, 18 U.S.C. §§ 2 and 3 are rendered essentially fungible; so long as the evidence supports a conviction under either statute, the fact that the Government charged under the wrong statute becomes legally irrelevant and a defendant may be convicted of an offense which he did not in fact commit.

By its determination that assistance rendered during the commission of an underlying substantive offense violates 18 U.S.C. § 3, the Court of Appeals has reached a result that conflicts with other federal court decisions holding that an accessory after the fact must render his assistance after the commission of the underlying crime.

D. This Court Should Grant the Writ, Vacate the Judgment of the Court of Appeals and Remand for Reconsideration in Light of the Fact that the Record Discloses that Petitioner Pleaded Guilty to Counts of a Criminal Information That Did Not Charge Offenses Punishable Under the *United States Code*

Upon its independent examination of the record in a federal criminal case in which the Solicitor General acknowledges that reversible error exists, this Court not infrequently has granted a certiorari petition filed by the defendant, vacated the judgment of the Court of Appeals and remanded the case for reconsideration in light of the Government's present position. *See, e.g., Mariscal* v. *United States*, 449 U.S. 405 (1981). Petitioner respectfully requests that the Court follow that practice in this case and has separately asked the Solicitor General to join in this request.[6]

In *Watkins* v. *United States*, 429 U.S. 1034 (1977), this Court, in reviewing the certiorari petition, noticed *sua sponte* that the conviction for violation of 18 U.S.C. § 473 (selling forged government obligations) might be precluded by a prior decision of this Court, *Prussian* v. *United States*, 282 U.S. 675 (1931). In *Prussian*, the Court had held that an endorsement on a government obligation was not itself an obligation of the United States, and the petitioner in *Watkins* had been convicted upon the theory that he had sold genuine United States Savings Bonds which bore forged endorsements. *Id.*, at 678.

In responding to this Court's request that the parties address this question, Solicitor General Bork took the position on the merits that the conviction could not stand.

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[6] By letter of April 20, 1990 to the Solicitor General, ten copies of which have been lodged with the Clerk upon the filing of this petition, petitioner has expressly requested that the Solicitor General acknowledge to this Court that petitioner's conviction cannot stand on the basis of the record and applicable law.

In doing so, he acknowledged that the petitioner had not raised this argument in the Court of Appeals or in his certiorari petition. The Solicitor General nevertheless recommended that the petition be granted and that the judgment be reversed and the indictment dismissed. As he put it, "there seems little point in requiring petitioner to make these arguments in a proceeding under 28 U.S.C. 2255, and we therefore believe that the error should be noticed under Rule 40(1)(d)(2) [now Rule 24.1.(a)] of the Rules of this Court."[7]

In the case at bar, as in *Watkins*, the petitioner has been convicted of violating a provision of Title 18 which, on the facts as charged in the information, he could not have violated. All three pertinent counts of the criminal information in this case charged petitioner with violating 18 U.S.C. § 3 on the basis of acts committed "[a]t said time and place" as the underlying substantive offenses. As discussed more fully in part C above, one cannot be an accessory *after* the fact of a crime unless one has committed acts *after* that crime. Furthermore, and as set forth in part B of the Statement of the Facts above, the record in this case is consistent with the charge in the information.

Nor does the fact that petitioner's conviction comes by a plea of guilty distinguish this case from *Watkins*. For example, in *Carter* v. *United States*, 350 U.S. 928 (1956), the petitioner had pled guilty to wilful attempts to evade

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[7] For the convenience of the Court, ten copies of the Solicitor General's Supplemental Memorandum in *Watkins*, which is not available in the Court's archives because *Watkins* was here on the IFP docket, have been lodged with the Clerk upon the filing of this petition. Under Rule 24.1.(a), the Court may notice "plain error" in cases otherwise properly before it even if the parties have not comprehended that error at the certiorari stage (or previously).

the payment of federal income taxes.[8] Over three years later, he filed a collateral attack on that plea, claiming that he had not intentionally violated the law and that he had denied any intent to violate the law when his plea was originally taken. Mem. for United States, at 4. Although the Government had prevailed in the lower courts, the Solicitor General advised this Court that, based on the Government's review, the record permitted no conclusion other than that the petitioner had in fact disavowed an essential element of the offense—wilful intent—to which he had pleaded. *Id.*, at 17. In *Carter*, the petitioner had been perceived by the lower courts as using his Rule 32(d) motion to escape prosecution altogether, but in this Court the petitioner disavowed any such intent. *Id.*, at 19. In sharp contrast, petitioner in the case at bar brought his Rule 32(d) motion prior to sentencing for the very purpose of reclaiming his right to a trial and putting the Government to its proof on any offenses the Government was prepared to charge and prosecute. This Court should act to restore that fundamental constitutional right.

CONCLUSION

The Government failed to carry out its end of the plea bargain, but insisted below that petitioner should be held to his obligations under that agreement. Although that dispute presents a question worthy of this Court's review, petitioner submits that there is an otherwise fatal defect in his conviction that demands reversal of the judgment of conviction.

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[8] The facts in *Carter* are as taken from the Solicitor General's memorandum filed in that case on behalf of the United States in response to the certiorari petition. For the convenience of the Court, ten copies of that memorandum have been lodged with the Clerk upon the filing of this petition.

April 20, 1990

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APPENDIX

APPENDICES

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APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5292

D.C. No. CR-88-0230-AWT-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GORDON STRUBE,
Defendant-Appellant.

FILED

OCT 11 1989

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and submitted October 5, 1989
San Francisco, California

Before: WALLACE, PREGERSON, ALARCON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Gordon Strube appeals from the judgment entered following the denial of his motion to withdraw his guilty plea. Strube seeks reversal on two grounds:

One. The district court failed to establish that there was a factual basis for the plea of guilty.

Two. The district court abused its discretion in denying the motion to withdraw the guilty plea because the record shows that the government breached the plea agreement.

I

Gordon Strube founded Consolidated Aeronautics Corporation (CAC) in 1956 and has acted as its president and chief executive officer since its inception. CAC sold aircraft parts to the United States Government during 1985 and 1986. In 1987, the United States Attorney's office for the Central District of California began a grand jury investigation of CAC and four of its employees for violations of 18 U. S. C. §§ 3, 1001 and 287.

In March of 1988 Strube expressed to his attorney a desire "to see whether I could voluntarily come forward and plead guilty to some offense in order to prevent the indictment of as many of my colleagues as possible."

On March 11, 1988, Strube and the codefendants entered into a verbal plea agreement with the United States. On March 25, 1988, the government filed a five-count information charging Strube, Ronald Guy and CAC with conspiracy to defraud the United States, falsely certifying "used, reconditioned and refurbished" parts as "new, unused and unaltered surplus" presenting false claims to the government for those parts and making false statements to the government.

A written plea agreement was executed on April 11, 1988. Strube agreed to plead guilty to counts two, three and five of the information as an accessory after the fact.

Count two of the information charges that on or about April 15, 1985, Strube comforted and assisted his codefendants in submitted false certifications to the U.S. Government. Count three charges that on or about April 4, 1986 Strube comforted and assisted his codefendants in presenting false claims for payment. Count five charges that on or about March 20, 1986, Strube comforted and assisted his codefendants in presenting false claims for payment. Each count alleges that Strube hindered and prevented the apprehension, trial and punishment of the codefendants by failing to disclose what he knew of the activity.

In exchange for the guilty pleas, the government agreed that "no further criminal charges will be brought against CAC or its employees." In addition, the government promised Strube that it would "not recommend at the time of sentencing a total period of incarceration of more than one year."

On May 9, 1988 Strube pled guilty to counts two, three and five. Before accepting the plea, the district court inquired of both parties in order to establish that there was a factual basis for the plea. After engaging in a dialogue with Strube, the court accepted the plea. Strube filed a written factual basis for his plea on the same day.

In its sentencing memorandum filed July 20, 1988, the government recommended that Strube be sentenced to "at least one year" in prison. Strube filed a motion to withdraw his guilty plea on August 8, 1988. Strube argued that the government breached the plea agreement by asking the court to sentence him to "a *minimum* of one year in prison", despite "the prosecutor's written commitment to request a *maximum* of one year in prison" (emphasis in original). Strube also claimed that there was not a sufficient factual basis to support his plea of guilty.

The district court denied the motion on August 15, 1988, stating that it was not influenced by whether the rec-

ommendation was for "at least" or for "not more than" one year. The court sentenced Strube to 2 years (the first six months to be served in a community treatment center, the remainder suspended), five years probation and a $300,000 fine.

Strube timely appeals.

II

Strube contends that the district court erred in denying his motion to withdraw his plea because there is insufficient factual basis to support his guilty plea as required by Fed. R. Crim. P. 11(f). We have conducted an independent review of the record to determine whether a factual basis for the plea existed as required by Rule 11(f).

At least a "minor investment of time and effort" is required to establish on the record that the defendant had knowledge of the crime and that he understood the consequences of his plea. *United States v. Kamer*, 781 F.2d 1380, 1385 (9th Cir. 1986), *cert. denied*, 479 U.S. 835 (1986). The record shows that the district court carefully questioned Strube prior to accepting his plea. The court asked Strube if he had read the document filed by his attorney, entitled Defendants' Factual Basis For Guilty Plea To Information, before he signed it. The court also asked Strube whether the facts set forth in the written factual basis were accurate. Strube replied affirmatively to both questions. In addition, the court required the prosecutor to state the facts he was ready to prove if the case went to trial.

The Defendants' Factual Basis describes Strube's involvement in the filing of false claims in the following language:

> As President and Chairman of the Board of the company, Mr. Strube was generally aware of some of CAC's contracts with the U.S. Government during the relevant time period.

In approximately January 1986 and later, Mr. Strube learned from other officers of CAC who had primary responsibility for the U.S. Government contracting business that CAC had supplied 'newly manufactured material' to the government in connection with certain 'selector set' contracts even though the contract specifications called for the material to be 'new, unused surplus'. Further, Mr. Strube learned at that time that certification had been submitted to the government by CAC personnel which falsely affirmed that the product was 'new, unused surplus,' when, as Mr. Strube learned after the fact, the product was 'newly manufactured' material. (This applies to the contracts referred to in counts two, three and five of the Information.)

Having learned these facts, Mr. Strube, as President and Chairman of the Board of CAC, should have directed the responsible officers of CAC to notify the government contracting officer of the relevant facts. Mr. Strube acknowledges that his failure to do so was illegal and he submits this as a factual basis for his guilty pleas to counts two, three and five of the Information.

The court explained to Strube that a factual basis must exist before his plea could be accepted. The court then instructed Strube that the prosecutor would "recite briefly in the nature of an offer of proof the evidence that the Government is ready to present if this case were to go to trial as proof of the occurrence of the offenses charged in this Information." Strube was instructed "to listen carefully to Mr. Fahey's statement because when he is through with his representations, I will ask each defendant whether or not you take issue with any representations made by Mr. Fahey."

After reciting facts showing that CAC employees filed false claims regarding the parts they sold to the government, the prosecutor stated to the court that he was ready to prove that Strube "knew what was going on at the time and did nothing to stop this particular pattern; indeed, assisted by lack of action and lack of intent to put an end to this particular path and, therefore, in the Government's view, could be found guilty of 18 USC Section 3 in conjunction with the false statement."

Strube's attorney advised the court that he took "exception to the portion of the prosecutor's offer of proof that Strube knew that the information was false or participated in filing false claims." Strube's attorney then stated, however, that "we can make out a factual basis". The court was informed that the failure to report to the government that he had learned that false statements had been made by his employees "constitutes a violation of Title 18 United States Code Section 3." Thereafter, the court announced that it was satisfied that a factual basis existed and accepted Strube's plea of guilty.

In this appeal, Strube contends that "the court received absolutely no facts whatsoever to demonstrate that Strube ever committed an affirmative act assisting Guy and Consolidated in concealing their violations. All parties present labored under the mistaken assumption that mere silence was sufficient to constitute a section 3 offense."

To establish a factual basis for a violation of 18 U.S.C. § 3 under Rule 11(f), the district court must be satisfied (1) that the underlying offense occurred; (2) that the defendant had knowledge thereof; and (3) that the defendant comforted or assisted the offender "in order to hinder or prevent his apprehension, trial or punishment." *United States v. Scharf*, 608 F.2d 323, 325-326 (9th Cir. 1979). Strube concedes that the first two requirements are satisfied.

Strube contends that the evidence shows no more than mere silence after Strube received knowledge of his employees past criminal behavior. Strube argues that the trial court was not informed of any facts that showed that he committed an affirmative act to comfort or assist his codefendants to hinder or prevent their apprehension as required under the law of this circuit as set forth in *United States v. Scharf*, 608 F.2d at 326. We disagree.

The record shows that Strube concealed from the government the fact that his employees were continuing to file false claims. In *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978), we held that a violation of section 3 is proved if the defendant permits another person to use her dwelling to commit a crime and conceals evidence of his continuing wrongdoing. *Id.* at 1353.

In the instant matter, the prosecutor was prepared to prove that, with knowledge that his codefendants had filed prior false claims, Strube permitted his employees to continue to file false claims in order to defraud the government for the benefit of CAC. In his offer of proof the prosecutor stated that "[t]here was a false claim in the amount of $66,000 submitted to the United States on or before April 4, 1986, and that is the basis for Count 3." The prosecutor further stated with respect to count five that "there was a false claim placed on the Government for approximately $19,000 on March 20, 1986, and this claim was false." These crimes occurred approximately three months after Strube was informed that his employees had filed false claims. The government was also prepared to establish that Strube "comforted and assisted" the offenders by proving that the pattern of presenting false claims continued with Strube's knowledge after he was informed of their illegal activity. This evidence clearly demonstrates more than mere silence. Rather, the record shows obstruction of justice by providing a safe harbor for the criminal action and concealing their ongoing crimes for personal or corporate profit.

The record reflects that the court's inquiry adequately established that Strube had knowledge of the offenses with which he was charged, that he comforted and assisted his employees in continuing to file false claims after he had knowledge of their prior illegal activity, and that he understood the consequences of his plea. Accordingly, the district court faithfully complied with the requirements of Rule 11(f).

III

Strube also claims that the government breached the plea agreement by recommending a one-year jail term as a minimum term rather than as a maximum period of incarceration. He argues that (1) the language in the sentencing memorandum of "at least one year" violated the express terms of the plea agreement; and (2) that the tone of the sentencing memorandum demonstrates the sentiment of the government that Strube should receive more than one year and violates the spirit of the plea agreement.

We review the denial of a motion to withdraw a guilty plea for abuse of discretion. *United States v. Navarro-Flores*, 628 F.2d 1178, 1183 (9th Cir. 1980). Prior to sentencing, a defendant may withdraw his plea upon a showing of a "fair and just" reason. Fed. R. Crim. P. 32(d). The right to withdraw a plea is not absolute, but should be freely granted by the trial court where defendant has met his burden to show a fair and just reason. *United States v. Read*, 778 F.2d 1437, 1440 (9th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986). If the defendant does not make a showing of a fair and just reason to withdraw his guilty plea, the government need not establish that it would be prejudiced if the motion were granted. *United States v. Rios-Ortiz*, 830 F.2d 1067, 1069 (9th Cir. 1987). Strube contends that the prosecution's alleged breach of the plea agreement is a "fair and just reason" to withdraw his guilty plea.

In determining whether a plea agreement has been breached, contract law principles apply. *Kamer*, 781 F.2d at 1387. Where a promise made by the government is a significant inducement for a defendant's guilty plea, the promise must be fulfilled, *Santobello v. New York*, 404 U.S. 257, 262 (1971), or the judgment of conviction must be vacated upon appeal. *Id.* at 263. Such an inducement may affect the voluntariness of the plea. *Read*, 778 F.2d at 1440. Therefore, the government must be held to the literal terms of the agreement. *United States v. Travis*, 735 F.2d 1129, 1132 (9th Cir. 1984). We must examine what the parties reasonably understood regarding the terms of the agreement. Any dispute over those terms must be determined by objective standards. *Read*, 778 F.2d at 1441. The district court's finding as to the terms of the contract will not be disturbed unless it is clearly erroneous. *Id.* at 1440.

In arguing that the trial court should be reversed, Strube relies on *Santobello*. In *Santobello*, the Supreme Court vacated the judgment of conviction because the government had failed to comply with its promise to the accused not to recommend a sentence to the court. *Id.* at 262. Instead, the prosecutor recommended that the trial judge impose the maximum sentence. *Id.* at 259. The court reasoned that the significant role of plea bargaining in the administration of justice directs that prosecutors fulfill their "bargained for" commitments. *Id.* at 262.

Santobello is clearly distinguishable factually. The prosecutor's recommendation of a maximum term of imprisonment in *Santobello* was a clear and unmistakable breach of the promise to remain silent at the sentencing hearing, constituting a breach of the express terms of the plea agreement. *Id.* at 259. In the instant matter, Strube contends that the prosecutor's use of the words "at least one year" in the government's sentencing memorandum violated his agreement to recommend "no more than one year."

In opposing Strube's motion, the prosecutor stated that the government "did not intend to breach the agreement of ask for a higher term by using the words 'at least' " in the sentencing memorandum. The government's motion further states that the "use of the words 'at least' while perhaps ill-chosen, should not be seen for something it was not. Indeed the government has offered to delete those two words from the Sentencing Memorandum." (Government's Opposition to Defendant Gordon Strube's Motion to Withdraw Guilty Plea at 4.)

The district court interpreted the government's recommendation as being in substantial compliance with the terms of the agreement. We agree. At the sentencing hearing on August 15, 1988, the court stated its reason for denying defendant's motion.

> One, Mr. Fahey doesn't argue for a long prison sentence. He uses that term, I think in this context, he says, 'But for his age and health a long prison sentence would be called for.' So he's not asking for a long prison sentence.
>
> He does say that the government submits he should be sentenced to a term of—you know, and in a certain sense it is a semantic argument because if he said he should be sentenced to a prison term of one year it amounts, I think to the same thing if you say 'at least one year.' I think it acknowledges that while he can't recommend more, he is going to recommend one year. That is what I believe and that is the way I interpret it, and I think besides that it is a very—in my view, the remedy is, too, if there were a breach to sentence before another judge without that phrase present in the sentencing memorandum and I don't believe the reference to the long prison sentence would otherwise be in order as

> a breach of the agreement, so for those reasons I deny the motion to withdraw the plea of guilty.

The record shows that Strube's "age and health" were significant factors in negotiating the plea agreement. "In view of Mr. Strube's health problems, it was important for me to attempt to obtain a commitment from Mr. Fahey to recommend probation for Mr. Strube." (Marmaro Declaration, attached to Defendant's Motion to Withdraw, at ¶ 22.) However, "[t]he most that the prosecutor would offer was his agreement not to recommend more than one year in prison." *Id.*

The district court's interpretation of the words used by the prosecutor as a recommendation of no more than one year is not clearly erroneous. We agree with the district court that the prosecutor's recommendation as modified orally prior to sentencing did not violate the plea agreement. The district court did not abuse its discretion in denying Strube's motion to withdraw his plea of guilty.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5292
D.C. No. CR-88-0230-AWT- 2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GORDON STRUBE,
Defendant-Appellant.

FILED

JAN 23 1990

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: WALLACE, PREGERSON, and ALARCON, Circuit Judges.

The memorandum filed October 11, 1989 is amended as follows:

On page 11, strike the first and second sentence of the last paragraph. Insert instead:

> Thus, the prosecutor made clear in his statement to the court prior to sentencing that the government intended to rely on the terms of the plea agreement. The district court construed the prosecutor's recommendation, as clarified by his oral

statements, as being in compliance with the terms of the plea agreement.

On page 12, strike the first two sentences of the last paragraph. Insert instead:

> "Good faith disputes of the parties as to the terms of a plea agreement are to be resolved by the district court in which the plea was originally submitted." *United States v. Bornstein*, 623 F.2d 1327, 1330 (9th Cir. 1980). The district court fully explored the intent of the parties concerning the terms of the plea agreement before pronouncing sentence. The district court concluded that under the terms of the plea agreement the prosecutor could not recommend more than one year, but was free to argue that the sentence should not be less than one year. The district court's interpretation of the intent of the parties was not clearly erroneous.

With the memorandum thus amended, the panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5292

D.C. No. CR-88-0230-AWT-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GORDON STRUBE,
Defendant-Appellant.

FILED

OCT 11 1989**

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and submitted October 5, 1989
San Francisco, California

Before: WALLACE, PREGERSON, ALARCON, Circuit Judges.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Editor's Note: This reproduction incorporates amendments to the court's opinion of October 11, 1989 that were ordered by the court on January 23, 1990.

Gordon Strube appeals from the judgment entered following the denial of his motion to withdraw his guilty plea. Strube seeks reversal on two grounds:

One. The district court failed to establish that there was a factual basis for the plea of guilty.

Two. The district court abused its discretion in denying the motion to withdraw the guilty plea because the record shows that the government breached the plea agreement.

I

Gordon Strube founded Consolidated Aeronautics Corporation (CAC) in 1956 and has acted as its president and chief executive officer since its inception. CAC sold aircraft parts to the United States Government during 1985 and 1986. In 1987, the United States Attorney's office for the Central District of California began a grand jury investigation of CAC and four of its employees for violations of 18 U. S. C. §§ 3, 1001 and 287.

In March of 1988 Strube expressed to his attorney a desire "to see whether I could voluntarily come forward and plead guilty to some offense in order to prevent the indictment of as many of my colleagues as possible."

On March 11, 1988, Strube and the codefendants entered into a verbal plea agreement with the United States. On March 25, 1988, the government filed a five-count information charging Strube, Ronald Guy and CAC with conspiracy to defraud the United States, falsely certifying "used, reconditioned and refurbished" parts as "new, unused and unaltered surplus" presenting false claims to the government for those parts and making false statements to the government.

A written plea agreement was executed on April 11, 1988. Strube agreed to plead guilty to counts two, three and five of the information as an accessory after the fact.

Count two of the information charges that on or about April 15, 1985, Strube comforted and assisted his codefendants in submitting false certifications to the U.S. Government. Count three charges that on or about April 4, 1986 Strube comforted and assisted his codefendants in presenting false claims for payment. Count five charges that on or about March 20, 1986, Strube comforted and assisted his codefendants in presenting false claims for payment. Each count alleges that Strube hindered and prevented the apprehension, trial and punishment of the codefendants by failing to disclose what he knew of the activity.

In exchange for the guilty pleas, the government agreed that "no further criminal charges will be brought against CAC or its employees." In addition, the government promised Strube that it would "not recommend at the time of sentencing a total period of incarceration of more than one year."

On May 9, 1988 Strube pled guilty to counts two, three and five. Before accepting the plea, the district court inquired of both parties in order to establish that there was a factual basis for the plea. After engaging in a dialogue with Strube, the court accepted the plea. Strube filed a written factual basis for his plea on the same day.

In its sentencing memorandum filed July 20, 1988, the government recommended that Strube be sentenced to "at least one year" in prison. Strube filed a motion to withdraw his guilty plea on August 8, 1988. Strube argued that the government breached the plea agreement by asking the court to sentence him to "a *minimum* of one year in prison", despite "the prosecutor's written commitment to request a *maximum* of one year in prison" (emphasis in original). Strube also claimed that there was not a sufficient factual basis to support his plea of guilty.

The district court denied the motion on August 15, 1988, stating that it was not influenced by whether the rec-

ommendation was for "at least" or for "not more than" one year. The court sentenced Strube to 2 years (the first six months to be served in a community treatment center, the remainder suspended), five years probation and a $300,000 fine.

Strube timely appeals.

II

Strube contends that the district court erred in denying his motion to withdraw his plea because there is insufficient factual basis to support his guilty plea as required by Fed. R. Crim. P. 11(f). We have conducted an independent review of the record to determine whether a factual basis for the plea existed as required by Rule 11(f).

At least a "minor investment of time and effort" is required to establish on the record that the defendant had knowledge of the crime and that he understood the consequences of his plea. *United States v. Kamer*, 781 F.2d 1380, 1385 (9th Cir. 1986), *cert. denied*, 479 U.S. 835 (1986). The record shows that the district court carefully questioned Strube prior to accepting his plea. The court asked Strube if he had read the document filed by his attorney, entitled Defendants' Factual Basis For Guilty Plea To Information, before he signed it. The court also asked Strube whether the facts set forth in the written factual basis were accurate. Strube replied affirmatively to both questions. In addition, the court required the prosecutor to state the facts he was ready to prove if the case went to trial.

The Defendants' Factual Basis describes Strube's involvement in the filing of false claims in the following language:

> As President and Chairman of the Board of the company, Mr. Strube was generally aware of some of CAC's contracts with the U.S. Government during the relevant time period.

> In approximately January 1986 and later, Mr. Strube learned from other officers of CAC who had primary responsibility for the U.S. Government contracting business that CAC had supplied 'newly manufactured material' to the government in connection with certain 'selector set' contracts even though the contract specifications called for the material to be 'new, unused surplus'. Further, Mr. Strube learned at that time that certification had been submitted to the government by CAC personnel which falsely affirmed that the product was 'new, unused surplus,' when, as Mr. Strube learned after the fact, the product was 'newly manufactured' material. (This applies to the contracts referred to in counts two, three and five of the Information.)
>
> Having learned these facts, Mr. Strube, as President and Chairman of the Board of CAC, should have directed the responsible officers of CAC to notify the government contracting officer of the relevant facts. Mr. Strube acknowledges that his failure to do so was illegal and he submits this as a factual basis for his guilty pleas to counts two, three and five of the Information.

The court explained to Strube that a factual basis must exist before his plea could be accepted. The court then instructed Strube that the prosecutor would "recite briefly in the nature of an offer of proof the evidence that the Government is ready to present if this case were to go to trial as proof of the occurrence of the offenses charged in this Information." Strube was instructed "to listen carefully to Mr. Fahey's statement because when he is through with his representations, I will ask each defendant whether or not you take issue with any representations made by Mr. Fahey."

After reciting facts showing that CAC employees filed false claims regarding the parts they sold to the government, the prosecutor stated to the court that he was ready to prove that Strube "knew what was going on at the time and did nothing to stop this particular pattern; indeed, assisted by lack of action and lack of intent to put an end to this particular path and, therefore, in the Government's view, could be found guilty of 18 USC Section 3 in conjunction with the false statement."

Strube's attorney advised the court that he took "exception to the portion of the prosecutor's offer of proof that Strube knew that the information was false or participated in filing false claims." Strube's attorney then stated, however, that "we can make out a factual basis". The court was informed that the failure to report to the government that he had learned that false statements had been made by his employees "constitutes a violation of Title 18 United States Code Section 3." Thereafter, the court announced that it was satisfied that a factual basis existed and accepted Strube's plea of guilty.

In this appeal, Strube contends that "the court received absolutely no facts whatsoever to demonstrate that Strube ever committed an affirmative act assisting Guy and Consolidated in concealing their violations. All parties present labored under the mistaken assumption that mere silence was sufficient to constitute a section 3 offense."

To establish a factual basis for a violation of 18 U.S.C. § 3 under Rule 11(f), the district court must be satisfied (1) that the underlying offense occurred; (2) that the defendant had knowledge thereof; and (3) that the defendant comforted or assisted the offender "in order to hinder or prevent his apprehension, trial or punishment." *United States v. Scharf*, 608 F.2d 323, 325-326 (9th Cir. 1979). Strube concedes that the first two requirements are satisfied.

Strube contends that the evidence shows no more than mere silence after Strube received knowledge of his employees past criminal behavior. Strube argues that the trial court was not informed of any facts that showed that he committed an affirmative act to comfort or assist his codefendants to hinder or prevent their apprehension as required under the law of this circuit as set forth in *United States v. Scharf*, 608 F.2d at 326. We disagree.

The record shows that Strube concealed from the government the fact that his employees were continuing to file false claims. In *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978), we held that a violation of section 3 is proved if the defendant permits another person to use her dwelling to commit a crime and conceals evidence of his continuing wrongdoing. *Id.* at 1353.

In the instant matter, the prosecutor was prepared to prove that, with knowledge that his codefendants had filed prior false claims, Strube permitted his employees to continue to file false claims in order to defraud the government for the benefit of CAC. In his offer of proof the prosecutor stated that "[t]here was a false claim in the amount of $66,000 submitted to the United States on or before April 4, 1986, and that is the basis for Count 3." The prosecutor further stated with respect to count five that "there was a false claim placed on the Government for approximately $19,000 on March 20, 1986, and this claim was false." These crimes occurred approximately three months after Strube was informed that his employees had filed false claims. The government was also prepared to establish that Strube "comforted and assisted" the offenders by proving that the pattern of presenting false claims continued with Strube's knowledge after he was informed of their illegal activity. This evidence clearly demonstrates more than mere silence. Rather, the record shows obstruction of justice by providing a safe harbor for the criminal action and concealing their ongoing crimes for personal or corporate profit.

The record reflects that the court's inquiry adequately established that Strube had knowledge of the offenses with which he was charged, that he comforted and assisted his employees in continuing to file false claims after he had knowledge of their prior illegal activity, and that he understood the consequences of his plea. Accordingly, the district court faithfully complied with the requirements of Rule 11(f).

III

Strube also claims that the government breached the plea agreement by recommending a one-year jail term as a minimum term rather than as a maximum period of incarceration. He argues that (1) the language in the sentencing memorandum of "at least one year" violated the express terms of the plea agreement; and (2) that the tone of the sentencing memorandum demonstrates the sentiment of the government that Strube should receive more than one year and violates the spirit of the plea agreement.

We review the denial of a motion to withdraw a guilty plea for abuse of discretion. *United States v. Navarro-Flores*, 628 F.2d 1178, 1183 (9th Cir. 1980). Prior to sentencing, a defendant may withdraw his plea upon a showing of a "fair and just" reason. Fed. R. Crim. P. 32(d). The right to withdraw a plea is not absolute, but should be freely granted by the trial court where defendant has met his burden to show a fair and just reason. *United States v. Read*, 778 F.2d 1437, 1440 (9th Cir. 1985), *cert. denied*, 479 U.S. 935 (1986). If the defendant does not make a showing of a fair and just reason to withdraw his guilty plea, the government need not establish that it would be prejudiced if the motion were granted. *United States v. Rios-Ortiz*, 830 F.2d 1067, 1069 (9th Cir. 1987). Strube contends that the prosecution's alleged breach of the plea agreement is a "fair and just reason" to withdraw his guilty plea.

In determining whether a plea agreement has been breached, contract law principles apply. *Kamer*, 781 F.2d at 1387. Where a promise made by the government is a significant inducement for a defendant's guilty plea, the promise must be fulfilled, *Santobello v. New York*, 404 U.S. 257, 262 (1971), or the judgment of conviction must be vacated upon appeal. *Id.* at 263. Such an inducement may affect the voluntariness of the plea. *Read*, 778 F.2d at 1440. Therefore, the government must be held to the literal terms of the agreement. *United States v. Travis*, 735 F.2d 1129, 1132 (9th Cir. 1984). We must examine what the parties reasonably understood regarding the terms of the agreement. Any dispute over those terms must be determined by objective standards. *Read*, 778 F.2d at 1441. The district court's finding as to the terms of the contract will not be disturbed unless it is clearly erroneous. *Id.* at 1440.

In arguing that the trial court should be reversed, Strube relies on *Santobello*. In *Santobello*, the Supreme Court vacated the judgment of conviction because the government had failed to comply with its promise to the accused not to recommend a sentence to the court. *Id.* at 262. Instead, the prosecutor recommended that the trial judge impose the maximum sentence. *Id.* at 259. The court reasoned that the significant role of plea bargaining in the administration of justice directs that prosecutors fulfill their "bargained for" commitments. *Id.* at 262.

Santobello is clearly distinguishable factually. The prosecutor's recommendation of a maximum term of imprisonment in *Santobello* was a clear and unmistakable breach of the promise to remain silent at the sentencing hearing, constituting a breach of the express terms of the plea agreement. *Id.* at 259. In the instant matter, Strube contends that the prosecutor's use of the words "at least one year" in the government's sentencing memorandum violated his agreement to recommend "no more than one year."

In opposing Strube's motion, the prosecutor stated that the government "did not intend to breach the agreement of ask for a higher term by using the words 'at least' " in the sentencing memorandum. The government's motion further states that the "use of the words 'at least' while perhaps ill-chosen, should not be seen for something it was not. Indeed the government has offered to delete those two words from the Sentencing Memorandum." (Government's Opposition to Defendant Gordon Strube's Motion to Withdraw Guilty Plea at 4.)

Thus, the prosecutor made clear in his statement to the court prior to sentencing that the government intended to rely on the terms of the plea agreement. The district court construed the prosecutor's recommendation, as clarified by his oral statements, as being in compliance with the terms of the plea agreement. At the sentencing hearing on August 15, 1988, the court stated its reason for denying defendant's motion.

> One, Mr. Fahey doesn't argue for a long prison sentence. He uses that term, I think in this context, he says, 'But for his age and health a long prison sentence would be called for.' So he's not asking for a long prison sentence.
>
> He does say that the government submits he should be sentenced to a term of—you know, and in a certain sense it is a semantic argument because if he said he should be sentenced to a prison term of one year it amounts, I think to the same thing if you say 'at least one year.' I think it acknowledges that while he can't recommend more, he is going to recommend one year. That is what I believe and that is the way I interpret it, and I think besides that it is a very—in my view, the remedy is, too, if there were a breach to sentence before another judge without that phrase present in the sentencing memorandum

> and I don't believe the reference to the long prison sentence would otherwise be in order as a breach of the agreement, so for those reasons I deny the motion to withdraw the plea of guilty.

The record shows that Strube's "age and health" were significant factors in negotiating the plea agreement. "In view of Mr. Strube's health problems, it was important for me to attempt to obtain a commitment from Mr. Fahey to recommend probation for Mr. Strube." (Marmaro Declaration, attached to Defendant's Motion to Withdraw. at ¶ 22.) However, "[t]he most that the prosecutor would offer was his agreement not to recommend more than one year in prison." *Id.*

"Good faith disputes of the parties as to the terms of a plea agreement are to be resolved by the district court in which the plea was originally submitted." *United States v. Bornstein*, 623 F.2d 1327, 1330 (9th Cir. 1980). The district court fully explored the intent of the parties concerning the terms of the plea agreement before pronouncing sentence. The district court concluded that under the terms of the plea agreement the prosecutor could not recommend more than one year, but was free to argue that the sentence should not be less than one year. The district court's interpretation of the intent of the parties was not clearly erroneous. The district court did not abuse its discretion in denying Strube's motion to withdraw his plea of guilty.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 88-230-AWT

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CONSOLIDATED AERONAUTICS, GORDON STRUBE, AND RONALD GUY

Defendant.

HONORABLE A. WALLACE TASHIMA, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, AUGUST 15, 1988
LOS ANGELES, CALIFORNIA

DELIA C. ROTUNNO, CSR #2171
Official Court Reporter
312 North Spring Street, Room 438
Los Angeles, California 90012
(213) 687-4698

A-P-P-E-A-R-A-N-C-E-S:

FOR THE PLAINTIFF: UNITED STATES OF AMERICA

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* * *

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* * *

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* * *

[13] THE COURT: All right. I don't think either side really addressed the proper remedy. Assuming there was a breach of the agreement by the government, what is indicated to me by not only Santobello but the Ninth Circuit case U.S. versus Travis and a more recent second circuit case, I think those are all cases where sentencing has been pronounced is, one, resentencing with a clean [14] atmosphere. And I think, at best, you are entitled to resentencing before a different judge without this material or I say without the word "at least", in the memorandum before the judge. I think that is a motion you are entitled to.

Santobello doesn't say—none of those cases say that, the Ninth Circuit doesn't say that you are entitled to withdraw the plea.

I think it does depend on whether that is true to a certain extent on the—I will say the gravity of the breach, the materiality of the breach by the government.

I think that is part of the consideration to determine what the language is. I think in this case the sufficient remedy would be to send Mr. Strube to another judge to be sentenced by that judge. I'll call it an interpleading memorandum, but I don't think I am going to get to it.

I am going to deny the motion. I deny it for this reason: One, Mr. Fahey doesn't argue for a long prison sentence. He uses that term, I think in this context, he says, "But for his age and health a long prison sentence would be called for." So he's not asking for a long prison sentence.

He does say that the government submits he [15] should be sentenced to a prison term of at least one year. The term of—you know, and in a certain sense it is a semantic argument because if he said he should be sentenced to a prison term of one year it amounts, I think, to the same thing if you say "at least one year." I think it acknowledges that while he can't recommend more, he is going to recommend one year. That is what I believe and that is the way I interpreted it, and I think besides that it is a very—in my view, the remedy is, too, if there were a breach to sentence before another judge without that phrase present in the sentencing memorandum and I don't believe the reference to the long prison sentence would otherwise be in order as a breach of the agreement, so for those reasons I deny the motion to withdraw the plea of guilty.

* * *

APPENDIX E

United States District Court for Central District of California

---

CR 88-230-AWT

United States of America

vs.

GORDON STRUBE

DEFENDANT

JUDGMENT AND PROBATION/COMMITMENT ORDER AO 245 19 82

In the presence of the attorney for the government the defendant appeared in person on this date, August 15, 1988

COUNSEL

WITH COUNSEL Richard Marmaro (Retained)

PLEA

GUILTY, and the court being satisfied that there is a factual basis for the plea, to counts 2, 3 and 5,

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of false statements causing an act to be done, accessory after the fact in violation of 18 U.S.C. §§1001, 2(b), 3 as charged in count 2; false claims, causing an act to be done, accessory after the facts in violation of 18 U.S.C. §§287, 2(b), 3 as charged in counts 3 and 5 of the Information.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years but on the condition the defendant serve six (6) months in a community treatment center, execution of the remainder of the sentence is suspended as to imprisonment; defendant placed on five years probation.

SPECIAL CONDITIONS OF PROBATION

IT IS FURTHER ADJUDGED on count 2 that the defendant, whose address is 939 N. Alpine Dr., Beverly Hills, CA 90210, shall pay a fine in the sum of $100,000. to the U.S. Treasury payable through the U.S. Attorney, Room 1347, Claims & Judgments, 312 N. Spring St., L.A., CA 90012.

IT IS ADJUDGED on each of counts 3 and 5 that the defendant shall pay a fine in the sum of $100,000. to the U.S. Treasury payable through the U.S. Attorney and that the imposition of sentence with respect to imprisonment only is suspended and the defendant is placed on concurrent terms of probation for a period of five (5) years subject to General Order 225 & the following conditions: 1) the defendant shall serve 1000 hours of community service for the Foundation for People Inc. & 2) the total fine of $300,000. is payable within thirty (30) days of this date.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general con-

ditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS ORDERED that the defendant shall pay $150. in Special Assessments.

IT IS FURTHER ORDERED that execution of sentence is stayed until 12 noon, 9/12/88, at which time the defendant shall surrender to the facility designated by the Bureau of Prisons, or if no designation made, to U.S. Marshal this building. If a timely notice of appeal is filed, the stay shall continue pending the appeal and the trial bond shall remain as bond on appeal.

COMMITMENT RECOMMENDATION

IT IS RECOMMENDED that the defendant be permitted to seek medical treatment of his own choice and expense & that he be permitted to leave the CTC to obtain such services.

/s/ A. Wallace Tashima
A. WALLACE TASHIMA Date 8/16/88
U.S. District Judge

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-230

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONSOLIDATED AERONAUTICS CORPORATION,
GORDON STRUBE,
RONALD GUY,

Defendants.

INFORMATION

[18 U.S.C. § 371: Conspiracy; 18 U.S.C. § 1001: False Statements; 18 U.S.C.§ 287: False Claims; 18 U.S.C.§ 2(b): Causing An Act To Be Done; 18 U.S.C. § 3: Accessory After the Fact]

The United States Attorney charges:

COUNT ONE

[18 U.S.C. § 371]

A. *INTRODUCTION*

At all times material to this Information:

1. Defendant CONSOLIDATED AERONAUTICS CORPORATION ("CAC") was a company located in North Hollywood, California and engaged in the business of selling new, used and newly manufactured aircraft parts to the United States government.

2. Defendant GORDON STRUBE was the president of CAC and its chief executive officer.

3. Defendant RONALD GUY was a vice-president of sales at CAC.

B. *CONSPIRACY AND OBJECTS OF THE CONSPIRACY*

Beginning on a date unknown and continuing through on or about October 31, 1987 in the Central District of California and elsewhere, defendants CAC and GUY and others known and unknown, did conspire, combine and agree together and with each other to commit offenses against the United States:

1. To defraud the United States and agencies thereof by supplying used, reconditioned, refurbished and altered military aircraft parts contrary to contract requirements and specifications, in violation of 18 U.S.C. § 371;

2. To make false, fictitious and fraudulent claims upon agencies of the United States, in violation of 18 U.S.C. § 287;

3. To make false, fictitious and fraudulent statements and representations to agencies of the United States in violation of 18 U.S.C. § 1001

C. *MEANS OF THE CONSPIRACY*

The foregoing objects of the conspiracy were accomplished in substance as follows:

1. Defendant CAC, through its officers and employees, would enter into contracts with agencies of the United States to sell new and unused surplus military aircraft parts.

2. Defendant CAC, through its officers and employees, would thereafter supply used, reconditioned, newly manufactured, refurbished and altered military aircraft parts to United States Government agencies.

3. Defendant CAC, through its officers and employees, would on occasion falsely certify to United States government agencies that it was supplying new and unused surplus military aircraft parts.

4. Defendant CAC, through its officers and employees, would on occasion submit invoices to United States Government agencies which falsely stated that CAC was supplying new and unused surplus military aircraft parts.

D. *OVERT ACTS*

1. On or about October 10, 1984, defendant RONALD GUY prepared a false certification in connection with CAC Contract Number 7707.

2. On or about January 29, 1985, defendant CAC sent purchase order number 1128 to "Premach Corporation" requesting the manufacture of $51,000 of "sliders" in connection with CAC Contract Number 7707.

3. On or about May 9, 1985, defendant CAC approved the payment of "Production Hone and Lap" Invoice 9830 for $1,800 in connection with CAC Contract Number 7707.

4. On or about June 24, 1985, defendant CAC approved the payment of "Production Hone and Lap" Invoice 9965 for $1,040 in connection with CAC Contract Number 7707.

5. On or about July 8, 1985, defendant CAC submitted a claim upon the Defense Contract Administration Services Region, an agency of the United States, in the form of invoice number 9237 demanding payment in the amount of $57,544.

6. On or about July 24, 1985, defendant CAC submitted a claim upon the Defense Contract Administration Services Region, an agency of the United States, in the form of invoice number 9419 demanding payment in the amount of $115,088.

7. On or about August 27, 1985, defendant CAC submitted a claim upon the Defense Contract Administration

Services Region, an agency of the United States, in the form of invoice number 9543 demanding payment in the amount of $115,088.

8. On or about September 24, 1985, defendant CAC submitted a claim upon the Defense Contract Administration Services Region, an agency of the United States, in the form of invoice number 9642 demanding payment in the amount of $115,088.

9. On or about October 2, 1985, defendant CAC submitted a claim upon the Defense Contract Administration Services Region, an agency of the United States, in the form of invoice number 9677 demanding payment in the amount of $96,673.

COUNT TWO

[18 U.S.C. § 1001; § 2(b); § 3]

On or about April 9, 1985, within the Central District of California, defendants CONSOLIDATED AERONAUTICS CORPORATION and RONALD GUY knowingly and willfully made and caused to be made a false, fictitious and fraudulent statement and representation as to material facts within the jurisdiction of Defense Construction Supply Center, an agency of the United States, in that defendants CONSOLIDATED AERONAUTICS CORPORATION and RONALD GUY submitted and caused to be submitted to the Defense Construction Supply Center a certification that the selector sets for the A-7 military aircraft parts offered for sale were new, unused and unaltered and would not be reconditioned, refurbished or altered, when in truth and fact, as defendants CONSOLIDATED AERONAUTICS CORPORATION and RONALD GUY well knew, the aforementioned military aircraft parts were used, reconditioned and refurbished and contained newly manufactured "sliders."

At said time and place, defendant GORDON STRUBE, knowing that the above offense had been committed, re-

ceived, relieved, comforted and assisted defendants CONSOLIDATED AERONAUTICS CORPORATION and RONALD GUY in order to hinder and prevent their apprehension, trial and punishment.

COUNT THREE

[18 U.S.C. § 287, § 2(b), § 3]

On or about April 4, 1986, within the Central District of California, defendant CONSOLIDATED AERONAUTICS CORPORATION made and caused to be made a false, fictitious and fraudulent claim upon the Defense Contract Administration Services Region, an agency of the United States, in that defendant CONSOLIDATED AERONAUTICS CORPORATION submitted invoice number 0631 demanding payment in the amount of $66,220. Said claim was false, fictitious and fraudulent in that defendant CONSOLIDATED AERONAUTICS CORPORATION represented it was supplying new, unused and unaltered selector sets for the A-7 military aircraft when in truth and fact defendant CONSOLIDATED AERONAUTICS CORPORATION supplied used, reconditioned and refurbished selector sets which also contained newly manufactured "sliders."

At said time and place, defendant GORDON STRUBE, knowing that the above offense had been committed, received, relieved, comforted and assisted defendant CONSOLIDATED AERONAUTICS CORPORATION in order to hinder and prevent its apprehension, trial and punishment.

COUNT FOUR

[18 U.S.C. § 1001; § 2(b)]

On or about April 14, 1986, within the Central District of California, defendants CONSOLIDATED AERONAUTICS CORPORATION and RONALD GUY knowingly and

willfully made and caused to be made a false, fictitious and fraudulent statement and representation as to material facts within the jurisdiction of the United States Air Force, an agency of the United States, in that defendants CONSOLIDATED AERONAUTICS CORPORATION and RONALD GUY submitted and caused to be submitted to the United States Air Force a quotation stating that the hook assemblies for the F-104 military aircraft offered for sale were new, unused and acquired from the "DPDO in Weisbaden, West Germany," when in truth and fact, as defendants consolidated AERONAUTICS CORPORATION and RONALD GUY well knew, the aforementioned military aircraft parts were in part, newly manufactured, reconditioned and refurbished.

COUNT FIVE

[18 U.S.C. § 287, § 2(b) § 3]

On or about March 20, 1986, within the Central District of California, defendant CONSOLIDATED AERONAUTICS CORPORATION made and caused to be made a false, fictitious and fraudulent claim upon the Defense Contract Administration Services Region, an agency of the United States, in that defendant CONSOLIDATED AERONAUTICS CORPORATION submitted invoice number 0561 demanding payment in the amount of $19,600. Said claim was false, fictitious and fraudulent in that defendant CONSOLIDATED AERONAUTICS CORPORATION represented it was supplying new surplus hydraulic fittings for the F-4 military aircraft when in truth and fact defendant CONSOLIDATED AERONAUTICS CORPORATION supplied used, reconditioned and refurbished hydraulic fittings.

At said time and place, defendant GORDON STRUBE, knowing that the above offense had been committed, received, relieved, comforted and assisted defendant CONSOLIDATED AERONAUTICS CORPORATION in order

to hinder and prevent its apprehension, trial and punishment.

/s/ Robert C. Bonner
ROBERT C. BONNER
United States Attorney

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

NO. CR 88-230

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONSOLIDATED AERONAUTICS CORP., GORDON STRUBE, RONALD GUY,

Defendants.

ROBERT C. BONNER
United States Attorney
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division
WILLIAM F. FAHEY
Assistant United States Attorney
Chief, Public Corruption & Government Fraud Section
1300 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-3036

Attorneys for Plaintiff
United States of America

JOINT PLEA AGREEMENT

The United States, by and through its attorney of record, and the individual defendants, by and through their respective attorneys, hereby enter into the following Joint Plea Agreement:

I

DEFENDANTS' PLEAS

1. Defendant Consolidated Aeronautics Corporation ("CAC") shall waive indictment and plea guilty to the five count Information filed March 24, 1988 in this case.

2. Defendant Gordon Strube shall waive indictment and plead guilty to counts two, three and five of the Information filed in this case.

3. Defendant Ronald Guy shall waive indictment and plead guilty to counts one, two and four of the Information filed in this case.

II

GOVERNMENT'S AGREEMENT

A. In return for the above stated pleas, as well as the other conditions specified in this Joint Plea Agreement, the government agrees that:

1. As to defendant Gordon Strube, the government will not recommend at the time of sentencing a total period of incarceration of more than one year.

2. As to defendant Ronald Guy, the government will not recommend at the time of sentencing a total period of incarceration of more than three years.

3. The government acknowledges that defendants Gordon Strube and Ronald Guy will recommend that sentences of probation be imposed.

4. In consideration for defendants CAC, Strube and Guy agreeing to plead guilty to the charges set forth in the Information, the government agrees that no further criminal charges will be brought against CAC or its other officers and employees, including those who were targets of the grand jury investigation and against whom the government intended to seek an

indictment, for their actions in connection with those CAC contracts referred to in the memoranda of Charlene Izzo dated June 23, 1987, June 30, 1987, July 14, 1987 and July 31, 1987, which are attached hereto and incorporated herein by reference, or in connection with CAC Contract No. 4901.

5. Defendant Strube submits that he has a serious health problem. He requests, and the government does not oppose, that an independent physician examine defendant Strube and report his findings on the status of defendant Strube's health to the court and to the probation office prior to sentencing. Defendant Strube agrees to pay for such medical examination and report.

B. There is no agreement as to the maximum fine, if any, which can be imposed on CAC, Strube and Guy as to their pleas of guilty and the parties to this Joint Plea Agreement are free to make their own recommendation to the Court in this regard.

III

DEFENDANTS' AGREEMENTS

1. Defendant Consolidated Aeronautics Corporation agrees to make restitution to the government in the total amount of $987,891 representing the full amount of the contract price on CAC Contract Numbers 2324, 4627, 7707, 9356 and 9376. This restitution shall be made as directed by the court at sentencing.

2. Defendant CAC on behalf of itself and its successors and assigns, and defendants Gordon Strube and Ronald Guy agree that they shall not oppose debarment for a period of three years in accordance with Subpart 9.4 of the Federal Acquisition Regulations.

3. Defendant CAC represents that none of its affiliates has done or intends to do business with the govern-

ment, and agrees on behalf of its affiliates and their successors and assigns that they will not do or seek to do business with the government for a period co-extensive with the debarment of CAC. In the event any such entity solicits or accepts business from the government during said period, CAC agrees on behalf of such entity that it will not oppose debarment for a period co-extensive with the debarment of CAC.

4. Each defendant acknowledges that he has read and understood this Joint Plea Agreement with the Information filed in this case and that this Joint Plea Agreement is entered into freely and voluntarily and upon the advice of counsel.

5. Each defendant acknowledges that:

   a. The maximum penalties for violation of the statutes with which they are charged as follows:

Count 1 — *18 U.S.C. § 371*

CAC: a fine of $500.000

GUY: a fine of $250,000 and/or 5 years imprisonment;

Count 2 — *18 U.S.C. § 1001*

CAC: a fine of $500,000;

GUY: a fine of $250,000 and/or 5 years imprisonment;

— *18 U.S.C. § 3*

STRUBE: a fine of $125,000 and/or 2.5 years imprisonment;

Counts 3 and 5 — *18 U.S.C. § 287*

CAC: a fine of $1 million (as to each count);

— *18 U.S.C. § 3*

STRUBE: a fine of $250,000 and/or 2.5 years imprisonment (as to each count);

Count 4 — *18 U.S.C. § 1001*

CAC: a fine of $500,000;

GUY: a fine of $250,000 and/or 5 years imprisonment.

b. Each count of the information is a federal felony violation.

c. He has conferred with counsel and is satisfied with the legal representation received.

d. There will be no trial, that guilty pleas will be tendered to the court, and that all that will remain following the pleas will be the sentencing of each defendant.

6. This Joint Plea Agreement is entered into solely to resolve the federal criminal case involving the defendants.

IV

CONCLUSION

There are no other or additional agreements between the government and the defendants other than those contained in this document.

DATED: April 11, 1988.

Respectfully submitted,

ROBERT C. BONNER
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

/s/ W. F. Fahey
WILLIAM F. FAHEY
Assistant United States Attorney
Chief, Public Corruption and Government Fraud

Attorneys for Plaintiff
United States of America

/s/ Joseph J. Petrillo — Date: 4/11/88
For Consolidated Aeronautics Corp., Defendant

/s/ Alan Kriegel — Date: April 11, 1988
Alan Kriegel
Dunnells, Duvall, Bennett & Porter
1220 Nineteenth Street, N.W.
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(202) 861-1400
Attorney for CAC

/s/ Joseph J. Petrillo — Date: April 11, 1988
Joseph J. Petrillo
Petrillo & Hordell
2000 L Street, N.W., Suite 504
Washington, D.C. 20036
(202) 293-0400
Attorney for CAC

/s/ Gordon Strube — Date: April 11, 1988
Gordon Strube, Defendant

/s/ Richard Marmaro Date: April 11, 1988
Richard Marmaro
McCambridge, Deixler & Marmaro
2029 Century Park East, Suite 2700
Los Angeles, California 90067
(213) 277-2650
Attorney for Gordon Strube

/s/ Ronald Guy Date: April 11, 1988
Ronald Guy, Defendant

/s/ Plato Cacheris Date: April 11, 1988
Plato Cacheris
Dunnells, Duvall, Bennett & Porter
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Washington, D.C. 20036
(202) 861-1400
Attorney for Ronald Guy

/s/ Gerard F. Treanor Date: April 11, 1988
Gerard F. Treanor
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(703) 749-3500
Attorney for Ronald Guy

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CR 88-230-AWT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONSOLIDATED AERONAUTICS CORPORATION,
GORDON STRUBE,
RONALD GUY,

Defendants.

HONORABLE A. WALLACE TASHIMA, JUDGE PRESIDING

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, May 9, 1988

M. LENOIR EDDY, CSR #2504
Official Reporter
417 U. S. Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 628-2530

[2] APPEARANCES:

For the Plaintiff:

ROBERT C. BONNER
United States Attorney

ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division
WILLIAM F. FAHEY
Assistant United States Attorney
Chief, Public Corruption & Government Fraud Section
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-and-

PETRILLO & HORDELL
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For Defendant Gordon Strube:

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[3] For Defendant Ronald Guy:

VENEBLE, BAETJER & HOWARD
Attorneys at Law

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(703) 749-3500

-and-

DUNNELLS, DUVALL, BENNETT & PORTER
Attorneys at Law
By: PLATO CACHERIS
1220 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 861-1400

[4] LOS ANGELES, CALIFORNIA; MONDAY, MAY 9, 1988; 3:25 P.M.

THE COURT: There is a 3 o'clock matter, and we will take a recess before getting to the SIPC case.

THE CLERK: Yes, your Honor.

Item 17, CR 88-23000-AWT, United States of America vs. Consolidated Aeronautics, Gordon Strube and Ronald Guy.

MR. FAHEY: Good afternoon, your Honor, William Fahey for the United States.

THE COURT: Good afternoon.

MR. MARMARO: Good afternoon, your Honor, Richard Marmaro on behalf of Gordon Strube, who is present.

MR. TREANOR: Gerard Treanor on behalf of Mr. Guy.

MR. CACHERIS: Plato Cacheris on behalf of Mr. Guy, also.

MR. KRIEGEL: Alan Kriegel on behalf of Consolidated Aeronautics Corporation. Joseph Petrillo also on behalf of Consolidated Aeronautics Corporation.

THE COURT: My understanding is that this will be a change of plea and an entry of plea of guilty by the Cor-

poration—a change of plea by the individuals, and an entry of a guilty plea by the Corporation to the Information.

Am I correct?

MR. FAHEY: The Information and the two-named [5] defendants, your Honor, yes. We filed a joint plea agreement, and hopefully that has found its way to your Honor's file.

THE COURT: Yes, I have that. Let me see now. (Brief Pause.)

All right. The Corporation is going to plead guilty to five counts. Right?

MR. FAHEY: That's correct, your Honor.

THE COURT: And then Mr. Strube will plead guilty to Counts 2, 3, and 5? Correct?

MR. FAHEY: Yes, your Honor.

THE COURT: And Mr. Guy will plead guilty to Counts 1, 2 and 4.

MR. FAHEY: That's right, your Honor.

THE COURT: And then apparently all defendants have waived proceeding by Indictment.

MR. FAHEY: Yes, your Honor. The Joint Plea Agreement sets forth various of the constitutional rights, including the right to be indicted, and your Honor's copy should reflect signatures by both defendants as well as their lawyers.

THE COURT: It does, yes.

Let me ask the clerk then to take the pleas. Who is going to plead on behalf of the Corporation, an officer or counsel?

[6] MR. PETRILLO: Your Honor, I will plead on behalf of the Corporation, Joseph Petrillo, counsel.

THE COURT: Let me ask you, I think, first of all, the defendants appeared previously. Am I correct?

MR. FAHEY: Your Honor, they were arraigned before a magistrate.

THE COURT: Was the plea entered then or not?

MR. MARMARO: Your Honor—

THE COURT: I have a minute order here that says that. So all defendants pleaded not guilty on April 11th. Is that correct?

MR. MARMARO: That's correct, your Honor.

THE COURT: I will ask the clerk to take the change of pleas, the pleas of guilty from all three defendants.

Swear the defendants.

THE CLERK: Yes, your Honor.

Mr. Petrillo, will you step to the podium. on behalf of the Corporation, Consolidated Aeronautics, did you receive a copy of the Information?

MR. PETRILLO: Yes.

THE COURT: Do you wish that read to you in open court?

MR. PETRILLO: That is not necessary.

THE CLERK: Mr. Petrillo, on behalf of the [7] Corporation, is it your intention to withdraw your plea of not guilty previously entered as to Counts 1 through 55 and to enter a new and different plea of guilty?

MR. PETRILLO: That's correct.

THE CLERK: Mr. Petrillo, how do you now plead to Counts 1 through 5 of the Information, guilty or not guilty?

MR. PETRILLO: Guilty as to all counts.

THE CLERK: Thank you.

Mr. Strube, is Gordon Strube your true and correct name?

DEFENDANT STRUBE: Yes, it is.

THE CLERK: Did you receive a copy of the Information?

DEFENDANT STRUBE: Yes, I did.

THE CLERK: Do you wish to have it read to you now in open court?

DEFENDANT STRUBE: It isn't necessary.

THE CLERK: Thank you. Is it your intention, Mr. Strube, to withdraw your plea of not guilty previously entered as to Counts 2, 3, and 5 and now to enter a new and different plea of guilty?

DEFENDANT STRUBE: Yes, that's correct.

THE CLERK: Mr. Strube, how do you now plead to Counts 2, 3, and 5 of the Information, guilty or not [8] guilty?

DEFENDANT STRUBE: Guilty.

THE CLERK: Thank you.

Mr. Guy, please approach the podium.

Is Ronald Guy your true and correct name?

DEFENDANT GUY: Yes, it is.

THE CLERK: Did you receive a copy of the Information?

DEFENDANT GUY: Yes, I did.

THE CLERK: Do you wish it read to you now in open court?

DEFENDANT GUY: Not necessary.

THE CLERK: Mr. Guy, is it now your intention to withdraw your plea of not guilty previously entered as to Counts 1, 2 and 4 of the Information and now to enter a new and different plea of guilty?

DEFENDANT GUY: Yes, that's correct.

THE CLERK: Mr. Guy, how do you now plead to Counts 1, 2 and 4 of the Information, guilty or not guilty?

DEFENDANT GUY: Guilty.

THE CLERK: Thank you.

Mr. Strube, Mr. Guy and Mr. Petrillo, on behalf of the Corporation, will you please raise your right hands. The Court will ask you a series of questions and you will be have to under oath.

[9] (Defendants duly sworn by clerk.)

THE COURT: I am addressing all three defendants now jointly, and at times, if I want a response from an individual, I will so specify.

Each of you now has entered a plea of guilty—Mr. Petrillo, as attorney for the Corporation—to certain counts of this Information. Before I can accept your pleas of guilty, as I am sure your counsel has explained to you, I have to be satisfied that you are acting freely and voluntarily, that you understand the consequences of the guilty plea and that you are in fact guilty; that is, that a sufficient factual basis exists to believe that you committed the offense to which you have just entered a plea of guilty.

Because you have been placed under oath, you have the obligation to answer my questions truthfully. If you do not, you will be subject to a charge of perjury or false statement.

I want each of you to feel free to consult with your attorney before you answer any questions if you believe

it would be helpful to you or if it is necessary before you can give an intelligent answer.

First of all, each of the individual defendants have had an opportunity to discuss the charges made against him with your respective attorneys. Is that correct?

[10] DEFENDANT GUY: Yes.

DEFENDANT STRUBE: Yes, I did.

THE COURT: Have you in fact fully discussed it with your attorneys?

DEFENDANT GUY: Yes.

DEFENDANT STRUBE: Yes, I did.

* * * * *

[11] Mr. Strube and Mr. Guy, each of you understands the nature of the charges against you in this case. Is that correct?

DEFENDANT STRUBE: I do.

DEFENDANT GUY: Yes, your Honor.

THE COURT: Mr. Strube, the charges against you in Counts 2, 3 and 5 are all in the nature of false statement charges, as I understand it.

And, Mr. Fahey, you will correct me if I am wrong, but Count 2 charges a violation of Section 1001 of Title [12] 18, which is making a false statement in a matter in which the United States is interested.

Count 3 is making or submitting a false claim to the Defense Contract Administration, and Count 5 is a similar charge.

Do you understand those to be the nature of the charges against you, Mr. Strube?

MR. MARMARO: Your Honor, if I might, actually the charges against Mr. Strube are accessory after the fact to those substantive offenses that your Honor just recited.

THE COURT: You are speaking now about the charges in Count 3, which is accessory after the fact to those substantive offenses?

MR. MARMARO: Absolutely, and it is under Title 18 of the United States Code, Section 3.

THE COURT: Thank you, Mr. Marmaro.

You understand that to be the nature of the charges against you, Mr. Strube?

DEFENDANT STRUBE: Yes, your Honor.

THE COURT: Accessory after the fact to those substantive offenses.

DEFENDANT STRUBE: Yes, your Honor.

THE COURT: All right. Now, Mr. Guy, the charge against you is first, under Count 1. is the conspiracy

[13] * * * * *

THE COURT: All right. Now, each defendant understands under Count 1 the Corporation is subject to a maximum fine of $500,000.

Mr. Guy is subject to imprisonment of five years and a fine of $250,000.

And under Count 2, the Corporation is subject—when I say "subject," I mean to say this is the maximum [14] possible sentence that could be imposed.

Under Count 2, the Corporation is subject to a fine of $500,000, and Mr. Guy is subject to five years imprisonment and to a maximum fine of $250,000.

Mr. Strube is subject to a fine of $125,000, and two-and-a-half years imprisonment.

Under Counts 3 and 5, the Corporation is subject to a fine of $1 million under each count, and that under Counts

3 and 5 Mr. Strube is subject to a fine of $250,000 and two-and-a-half years imprisonment as to each count.

And that as to Count 4, the Corporation is subject to a fine of $500,000, and Mr. Guy is subject to a fine of $250,000, and imprisonment of five years.

Each defendant understands that these are the maximum possible sentences under these counts to which he is subjecting himself by his plea of guilty. Each of you understands that?

DEFENDANT STRUBE: I do.

DEFENDANT GUY: Yes, your Honor.

THE COURT: Mr. Strube, are you satisfied that your attorney has done everything a lawyer can do for you in these circumstances in having arrived at this negotiated plea agreement?

DEFENDANT STRUBE: Yes, your Honor, I am.

THE COURT: And Mr. Guy, are you likewise [15] satisfied that your attorney has performed all that can be reasonably expected of an attorney under these circumstances in having arrived at this plea agreement on your behalf?

DEFENDANT GUY: Yes, your Honor.

THE COURT: I am going to inform all of you now, all defendants, of your constitutional rights.

First of all, under the Constitution, each defendant charged with a felony offense has the right to require that the Government proceed by way of Indictment.

My understanding is each defendant has and is waiving that right and agrees to proceed by way of Information.

The right to require the Government to proceed by way of Indictment means that the Government attorney has to appear before a grand jury and to convince that body by

a majority vote, I believe, that reasonable or probable cause exists on the basis of the evidence presented to the grand jury to believe that the offense charged has been committed by the defendant. And if the grand jury does not so believe, it does not have to return an Indictment.

Each defendant understands that that is what is meant by a right to require the Government to proceed by way of Indictment by grand jury. Do you understand [16] that?

DEFENDANT STRUBE: Yes.

DEFENDANT GUY: I do.

MR. PETRILLO: Yes.

THE COURT: And each of you has agreed to waive that right and to proceed by way of an Information, which is a charge made by the U.S. Attorney. Is that correct?

DEFENDANT STRUBE: Yes, your Honor.

DEFENDANT GUY: Yes, it is, your Honor.

MR. PETRILLO: The Corporation so agrees.

THE COURT: Now, aside from that right, each defendant has the following rights: the right to plead not guilty as each defendant has done originally in this case, and the right to persist or to continue with a not guilty plea; the right to trial and to trial by jury; the right to the assistance of counsel at such a trial; the right to confront and to cross-examine all of the witnesses against him at such a trial.

With respect to non-corporate defendants, the right not to incriminate yourself, the right not to testify against yourself.

And, finally, with respect to all defendants, the right to require that the Government prove your guilt by proof beyond a reasonable doubt. Each defendant understands that you have these rights. Is that correct?

[17] DEFENDANT STRUBE: Yes, your Honor.

DEFENDANT GUY: Yes, your Honor.

THE COURT: Each of you understands that by pleading guilty you are waiving all of these constitutional rights. Is that correct? Do you understand that?

DEFENDANT STRUBE: I do, correct.

THE COURT: You understand that?

DEFENDANT GUY: I do.

MR. PETRILLO: Yes, your Honor.

THE COURT: And you all understand that under a plea of guilty you have no trial at all. Is that correct, Mr. Guy?

DEFENDANT GUY: I do.

DEFENDANT STRUBE: Yes, I do.

THE COURT: Each defendant has signed—There was filed in this case on April 26th a document entitled Joint Plea Agreement, where many of these matters are explained by each of you.

And it appears to bear the signatures of Mr. Petrillo for Consolidated, Mr. Kriegel as attorney for Consolidated, Mr. Petrillo in his capacity as an attorney; by Mr. Gordon Strube, by Mr. Marmaro, his attorney; by Mr. Guy and Mr, Cacheris and Mr. Treanor, as his attorneys.

Has each of you, each defendant acknowledges [18] having reviewed this Joint Plea Agreement and having signed it?

DEFENDANT STRUBE: I have.

DEFENDANT GUY: Yes, your Honor.

MR. PETRILLO: Yes, I have, on behalf of the Corporation.

THE COURT: The substance of the plea agreement has been explained to you by your respective own attorneys. Is that correct?

DEFENDANT STRUBE: Yes, your Honor.

DEFENDANT GUY: Yes, your Honor.

THE COURT: Is it correct that no promise has been made to you in exchange for your plea agreement other than any promise that may be set forth in this Joint Plea Agreement?

Is that a correct statement?

DEFENDANT STRUBE: Yes, your Honor.

DEFENDANT GUY: Yes, it is.

THE COURT: Each defendant understands that under this Joint Plea Agreement the sentence to be imposed is to be determined by the Court. Do you understand that?

DEFENDANT STRUBE: Yes, your Honor.

DEFENDANT GUY: Yes, I do.

MR. PETRILLO: I do.

THE COURT: Although the Court does acknowledge [19] that the Government has agreed not to make certain recommendations at the time of sentencing, the Court also acknowledges that the defendants have the right to make their own recommendation at the time of sentencing. And, still, despite that, as I understand the plea agreement, there is no promise as to what the sentence will be.

Is that your understanding also?

DEFENDANT STRUBE: Yes, it is.

DEFENDANT GUY: Yes, your Honor.

THE COURT: There are other collateral provisions in this plea agreement, and I am not going to go through them all.

But, for instance, I believe there is a representation here of restitution. Do you agree to the terms of restitution, as set forth in the plea agreement? Is that correct?

MR. PETRILLO: Your Honor, the restitution is to be made with the Corporation, and it understands that that is it's responsibility.

THE COURT: And there is also, I think, a representation here that no defendant will oppose debarment.

Is that a true statement? In other words, each of you agrees not to oppose debarment. Is that correct?

DEFENDANT STRUBE: Yes.

THE COURT: Do you understand what debarment is?

[20] DEFENDANT STRUBE: Yes, your Honor, I do.

DEFENDANT GUY: Yes.

THE COURT: Which means that the Corporation would not be eligible, as I understand it, to receive government contracts during the period it is barred by that agency.

Do you understand that?

DEFENDANT STRUBE: Yes, I do.

THE COURT: Mr. Guy, do you understand that?

DEFENDANT GUY: Yes, I do.

THE COURT: Addressing myself to all defendants, have any threats been made or any force been used to get you to plead guilty to these charges?

DEFENDANT STRUBE: No, sir.

DEFENDANT GUY: No, sir.

MR. PETRILLO: No, your Honor.

THE COURT: The Court cannot accept a guilty plea unless there is a sufficient factual basis for the plea. I'm going to ask Mr. Fahey to recite briefly in the nature of an offer of proof the evidence that the Government is ready to present if this case were to go to trial as proof

of the occurrence of the offenses charged in this Information.

I want you to listen carefully to Mr. Fahey's statement because when he is through with his representations, [21] I will ask each defendant whether or not you take issue with any representation made by Mr. Fahey. And, if you do so, then I will ask you to give me your version of that particular event or that phase of the events because I want to make sure that there is a sufficient basis for accepting the pleas in this case.

MR. MARMARO: Your Honor, might my client be permitted to sit down? He has a serious heart condition.

THE COURT: Certainly. Just sit down at counsel table, Mr. Strube.

MR. MARMARO: Thank you, your Honor.

THE COURT: Mr. Fahey, go ahead.

MR. FAHEY: Yes, your Honor. If this matter were to proceed to trial, the Government would establish that Consolidated Aeronautics Corporation is a corporation located in North Hollywood. Its president during the relevant time period was Gordon Strube.

One of the, non-chief executive officers, but more influential officers at the Corporation during the relevant time period was Mr. Ronald Guy. Indeed, he was vice-president of Consolidated Aeronautics Corporation and was responsible for obtaining and negotiating many of the contracts, including some of the contracts that we will be discussing here today.

The grand jury was unclear, and the Government [22] would not be able to establish a precise date that the conspiracy began. But suffice it to say that it was active during the time period of about at least 1984 and '85 through October 31st, 1987.

The overall conspiracy that the Government would prove at trial would be that there was a pattern with some of the contracts of Consolidated Aeronautics Corporation to supply reconditioned, refurbished, remanufactured and on occasion used parts when government contracts called for the supply of new and unused parts.

Having supplied those new and unused parts, your Honor, to various government agencies, primarily the Air Force, at least as is alleged in the Information in this case, the Government's position is that on occasion Consolidated Aeronautics Corporation would supply false statements to the Government; that is falsely certifying that new and unused parts would be provided whereas, in true and in fact, used, remanufactured, reconditioned parts instead were provided.

Similarly, claims were made on the United States Government for payment on its contract, and in these claims there were false statements made as well, and those statements once again were that Consolidated, through its employees, was supplying new and unused parts when in fact they were not.

[23] Your Honor, the Indictment is set out in various parts and for the Government's explanation to the Court is that with respect to the overt acts charged in Count 1 of the Indictment, that pertains to Consolidated Aeronautics corporation Contract Number 7707, and that has to do with some selector sets which go on a A-7 Navy jet.

Your Honor, I have a photograph of an A-7 jet. The selector set controls one of the rear tail sections and is critical for stabilization of the jet.

These particular parts, as charged in Count 1, Overt Acts 1 through 9, were defective parts, your Honor, and when they were tested by the government, turned out to be defective. All of them failed at a particular test before they were installed on a jet airplane.

Had they failed, the Government would have elicited testimony that the plane would have crashed with the attendant loss of the plane as well as the pilot and co-pilot aboard.

These particular parts were supposed to be new and unused; whereas, instead, the Government will put on evidence that with respect to the slider—and, your Honor, again if the Court will bear with me for just a moment, it is a bit easier to explain with a demonstrative device.

This is a selector set. Inside is a slider, a critically-machined item. This slider was newly [24] manufactured, the piece inside, by a subcontractor of Consolidated Aeronautics. Consolidated had contracts with the Air Force to provide new and unused parts originally manufactured by LTV in Texas and, instead, we would put on testimony to the effect that it was a used part. The sleeve on the outside, when received by one of the subcontractors, was used and then a newly manufactured slider was placed inside and wasn't machined carefully enough so that when it went down to the Naval air station for testing before it went on the jet, all of those parts failed when tested on some 200 in number.

So Count 1, Overt Acts 1 through 9 deal first with the selector sets, Contract 7707. And the Government's proof in substance is that used, refurbished and remanufactured parts were provided by the Corporation.

Oh, by the way, your Honor, with respect to Counts 1, 2, and 3, it was Ronald Guy who was the officer responsible at Consolidated Aeronautics Corporation for negotiating these contracts and ultimately signing these contracts on behalf of the Corporation.

With respect to Count 2, your Honor, that pertains to Consolidated Aeronautics Corporation Contract Number 9376, and that, too, was for selector sets for the A-7 jet. And in this particular case, your Honor, there was a false

statement made to the Government on or about April [25] 9, 1985, where the company, through Mr. Guy, falsely certified that these were new and unused parts, and the Government will put on evidence in fact that they were not at all.

Mr. Strube—and I think the factual basis will be expanded on by Mr. Marmaro and his client—knew what was going on at the time and did nothing to stop this particular pattern; indeed, assisted by lack of action and lack of intent to put an end to this particular path and, therefore, in the government's view, could be found guilty of 18 USC Section 3 in conjunction with the false statement.

With respect to Count 3 of the Indictment, that pertains to Contract 9356. It is the third selector set contract, and the Government's proof with respect to Count 3 would be the same.

There was a false claim in the amount of $66,000 submitted to the United States on or before April 4, 1986, and that is the basis for Count 3.

I would indicate to the Court the total value of these selector set contracts in Counts 1, 2 and 3 was approximately $900,000.

With respect to Count 4, which is also a count of false statement, this pertains to a different type of contract. These are hook assemblies for F-104 military [26] aircraft.

Consolidated represented, through its officers, and Mr. Guy in particularly, that these parts were acquired from the Defense Procurement Depot in Wiesbaden, West Germany, and are new and unused. In fact, the Government would put on evidence largely from the files of Consolidated that show that these parts were newly manufactured and assembled from various other sources, so that the Government, instead of getting what they contracted for, which was new and unused parts from the original manufacturer, instead got parts that were in effect rebuilt by

Consolidated Aeronautics Corporation without the attendant competence level that the Government place in the parts. There is no showing that the government was able to obtain, after review of these particular files, that these parts used to rebuild the hook assemblies for the F-104 did in fact meet specifications.

Finally, with respect to Count 5, that pertains to Contract Number 2324. These are hydraulic fittings for an F-104 military aircraft. In this particular case there was a false claim placed on the Government for approximately $19,000 on March 20, 1986, and this claim was false in that Consolidated and its officers represented that new surplus hydraulic fittings were being conveyed or given to the United States military, when, in fact, these were [27] used, reconditioned and refurbished parts.

With respect to this particular contract, your Honor, there are internal documents at Consolidated that reflect these were used parts that were reworked by Consolidated and later submitted to the Government as new and unused parts.

With respect to Counts 3 and 5, if I have not made it clear, I believe the factual basis with respect to Mr. Strube's conduct would be the same as I outlined with respect to Count 2, and again I would expect that Mr. Marmaro and his client will be supplementing that basis.

Your Honor, that is the evidence in sum that the Government would be presenting if we were to go to trial.

* * * * *

[29] THE COURT: Thank you.

Mr. Strube or perhaps Mr. Marmaro on behalf of Mr. Strube, do you take issue with any of the representations that Mr. Fahey stated he is ready to prove or, on the other hand, do you wish to elaborate further on any matters that he mentioned or failed to mention?

MR. MARMARO: Your Honor, we do take some exception, and I think part of it is taking Mr. Fahey's [30] invitation to supplement because this is a somewhat unique situation, as I think Mr. Fahey will agree.

First of all, your Honor, we subscribe to Mr. Petrillo's general or specific comments, rather, on the contracts at issue.

The two specific points that we take exception to, Mr. Fahey's factual basis on Mr. Strube's behalf are that Mr. Strube knew this information at the time—knew that the information was false, and that Mr. Strube participated in the conduct as alleged in the Information—the substantive conduct as alleged in the Information.

Your Honor, both of those are incorrect. Mr. Strube did not know of the conduct at the time, nor did he actively participate in the conduct.

Your Honor, we can make out a factual basis, and if the Court will indulge me, I would like to do that at this time.

THE COURT: Go right ahead, Mr. Marmaro.

MR. MARMARO: Your Honor, some background is really necessary.

During this investigation, four or five individuals in Mr. Strube's company were targeted, and at that time the prosecutor advised me that he had no specific evidence against my client, Mr. Strube. However, Mr. Strube founded this company and has been its head since its inception [31] in approximately 1956.

The reason that there was no evidence against Mr. Strube was that Mr. Strube was essentially out of the loop, so to speak, during the time these events occurred. From approximately 1982, your Honor, through 1984 Mr. Strube was primarily involved in the company's export business. The company has essentially two major compo-

nents of its business: one is its government contracting work and one is its exporting work.

Mr. Strube was principally involved in the export business from 1982 to 1984, and that required extensive travel on Mr. Strube's part.

Your Honor, in late 1984 Mr. Strube contracted a very serious ailment called bacterial endocarditis in one of his trips to Southeast Asia. I mentioned that, your Honor, because it becomes significant as to why Mr. Strube was not involved in the subsequent activity that followed.

From late 1984 to approximately early 1985, Mr. Strube was in the intensive care unit at Cedars-Sinai, where he underwent major heart surgery. There followed a lengthy period of confinement in the hospital and at home. This took place during 1985 and 1986 at the time of the percipient events of these contracts occurred, Mr. Strube wasn't at the office and was uninvolved in any [32] of the contracts.

Mr. Strube is pleading guilty, your Honor, and I believe there is a factual basis for the plea, in that sometime in 1986 Mr. Strube returned to the office on an intermittent basis. Certainly not a regular basis, and certainly had no involvement in the government contract work. But he did learn of the events that Mr. Fahey has recited and which appear in the Information.

Learning of those events in early 1986, your Honor, Mr. Strube failed to bring them to the attention of the authorities—either the investigating authorities or the Government contracting officer who had cognizance of these contracts.

Your Honor, I believe that constitutes a violation of Title 18 United States Code Section 3.

In return for Mr. Strube stating that and coming forward essentially volunteering his hat into this ring, Mr.

Fahey has agreed not to indict several other officers or employees of Consolidated. The purpose of Mr. Strube's plea, your Honor, is to tell the Court this happened in his company during the time that he was head of the company and during the time for which he wants to take responsibility. And that is the factual basis, your Honor.

THE COURT: Mr. Strube, do you agree and adopt your attorney's remarks insofar as your knowledge of what [33] was happening in 1986 is concerned?

DEFENDANT STRUBE: Yes, sir, I do. He has explained it very well.

THE COURT: In other words, he has set forth the reason for your entering into this plea of guilty?

DEFENDANT STRUBE: That's correct, yes.

THE COURT: You may sit down.

MR. FAHEY: Your Honor, may I have a moment with counsel?

THE COURT: Well, let me ask you a question first, Mr. Fahey, and then you can discuss this.

Assuming, Mr. Fahey, Mr. Marmaro's factual statement is correct about his client learning about these matters in 1986, do you believe a factual basis exists?

MR. FAHEY: I believe with respect to two of the three counts, your Honor, and I just wanted to have a brief moment with Mr. Marmaro with respect to Count 2.

THE COURT: Go right ahead.

(Mr. Fahey and Mr. Marmaro conferring.)

MR. MARMARO: Your Honor, I have spoken with Mr. Fahey, and I think this can be clarified. First, let me mention two points, your Honor.

The first is that we intend to file a written factual basis, your Honor, which will set forth in detail what I just re-

cited to the Court, so it will be a permanent [34] part of the record, and I have an original and copy to present to the Court at this time, with a copy for Mr. Fahey.

THE COURT: All right, fine.

MR. MARMARO: Your Honor, in addition to that, let me state that Count 2 charges conduct which occurred on or before April 9th, 1985. For purposes of Mr. Strube's factual basis, I believe it is sufficient to state that in or around January of 1986, prior to the time this investigation came to light, prior to the time any charges were filed, Mr. Strube learned of the facts which had occurred back in April of 1985 and failed to come forward to authorities, to either the Government contracting officer or to federal authorities, and I believe that—

THE COURT: Just a minute. You said he learned of it when?

MR. MARMARO: In or around January of 1986, your Honor. And I believe his failure to come forward at that time concerning the events of eight months previously constitutes a violation of Title 18 United States Code Section 3.

THE COURT: Do you believe on that basis there is a factual basis for the plea to Count 2, Mr. Fahey?

MR. FAHEY: I believe so, your Honor, if adopted by Mr. Strube, and I have not had a chance to see the more detailed factual basis that counsel has referred to. So [35] that might alleviate some of my concerns, as well.

MR. MARMARO: For Mr. Fahey's edification, the Strube factual basis is set forth on pages 1 through to the top of page 3.

THE COURT: Particularly the part in paragraph 6, which is on line 24 on page 2.

MR. MARMARO: That's correct, your Honor.

THE COURT: All right. I have the original here, and it appears to be signed by all relevant parties.

Mr. Strube, did you review this factual basis before you signed it?

DEFENDANT STRUBE: Yes, your Honor, I did.

THE COURT: And it correctly sets forth the date approximately on which you learned of these offenses and these events?

DEFENDANT STRUBE: Yes, sir, it does.

THE COURT: Thank you, Mr. Strube.

* * * * *

[40] THE COURT: All right. I am going to ask the clerk now to file the document entitled Defendants' Factual Basis for Guilty Plea to Information and on the basis of, one, the proffer made by Mr. Fahey; two, as qualified by various counsel as to parts of their proffer to which they disagree; and, three, including the factual basis as set forth in the pleading just filed by the defendants, I find with respect to each defendant that there is a sufficient factual basis for the plea in each case.

I further find that each defendant does understand [41] the nature of the charges against him or it, and the rights which are being waived by the plea of guilty, and that these rights are waived knowingly with a full understanding of the consequences of the guilty plea; and, for that additional reason as well as the factual basis, I accept the plea of guilty on behalf of each defendant.

* * * * *

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 88-230-AWT

UNITED STATES OF AMERICA,

Plaintiff,

v.

CONSOLIDATED AERONAUTICS CORP., GORDON STRUBE, RONALD GUY,

Defendants.

GOVERNMENT'S SENTENCING MEMORANDUM; DECLARATIONS; EXHIBITS

Hearing Date: July 25, 1988
Hearing Time: 1:30 p.m.

The United States, by and through its attorneys of record, hereby submits its Sentencing Memorandum in this case.

DATED: July 20, 1988.

Respectfully submitted,

ROBERT C. BONNER
United States Attorney
ROBERT L. BROSIO
Assistant United States Attorney
Chief, Criminal Division

/s/ W. F. Fahey
WILLIAM F. FAHEY
Assistant United States Attorney
Chief, Public Corruption and
Government Fraud Section

Attorneys for Plaintiff
United States of America

SENTENCING MEMORANDUM

IINTRODUCTION

Defendants Consolidated Aeronautics Corporation ("CAC"), Gordon Strube ("STRUBE") and Ronald Guy ("Guy") were charged in a five-count Information with conspiracy, false statements and false claims. In essence, defendants were charged with a scheme to sell to the U.S. military used, altered and defective aircraft parts.

This sentencing memorandum will establish that CAC has been involved for some time in purchasing used military jet parts and selling them to the government as "new and unused." CAC had been able to get away with this practice by cleaning, painting and refurbishing the parts before sale.

On May 9, 1988 defendants entered pleas of guilty. CAC pleaded guilty to each of counts one through five. STRUBE pleaded guilty to counts two, three and five. GUY pleaded guilty to counts one, two and four. As a result of these pleas, defendants face the following maximum penalties:

CAC:	A fine of $3.5 million;
Strube:	A jail sentence of 7 and 1/2 years and a fine of $1,125,000;
Guy:	A jail sentence of 15 years and a fine of $750,000.

For the reasons set forth more fully herein, the government recommends the following sentences:

CAC:	A fine of $3.5 million:
Strube:	A jail sentence of one year and a fine of $625,000;
Guy:	A jail sentence of three years and a fine of $100,000.

* * *

III

RECOMMENDATIONS

* * *

B. *GORDON STRUBE*

Defendant STRUBE is the owner and founder of CAC. He continued to act as president and chairman of the board of CAC through the time period of the charges in this case.

STRUBE admits in his "factual basis" (filed May 9, 1988) that he "was generally aware of some of CAC's contracts with the United States Government during the relevant time period." STRUBE also claims he learned "in approximately January, 1986 and later" that CAC was involved in product substitution and supplying the United States with false certifications. STRUBE therefore admits that he was an accessory after the fact.

The government submits, however, that STRUBE is trying to minimize his culpability in order to avoid appropriate punishment.

First, it is very difficult to believe that the president of CAC would not know of CAC's regular practice of selling used parts as new. This is especially true when as much as 80% of CAC's sales were of used, reconditioned parts. *See* Schneider statement.

Second, the selector set contracts (counts 1-3) totalled more than $900,000. These were, in the words of June Fitzgerald, "significant" contracts and ones in which "the management of [CAC] would be very much involved and interested." *See* Fitzgerald Grand Jury testimony at 31. It is hard to imagine that the president of the company would not be aware of the extensive costs incurred by CAC in refurbishing almost 1000 used selector sets to be sold to the U.S. military.

Third, even if STRUBE's minimizations are taken at face value, it is clear that he did nothing to change the CAC practice of selling used and defective parts. STRUBE claims that he learned of the practice of product substitution in January, 1986. Yet as late as February 1987 CAC continued to sell used and defective parts as "new." *See* Declaration of Allan Lewis.

Fourth, STRUBE's credibility is suspect at best. Attorney Robert Jones advises that STRUBE has in the past secreted assets during litigation and has been involved in "dishonest, unethical and fraudulent conduct." *See* letter of Robert Jones attached to the Declaration of William F. Fahey as Exhibit 9. The person described by Mr. Jones in his letter is not worthy of the benefit of the doubt as to CAC's conduct.

It is submitted that CAC's long ingrained practice of selling defective parts was known to and orchestrated by STRUBE. But for his age and health, a long prison sentence would be called for. Nevertheless, some prison is warranted to deter STRUBE and other corporate executives who attempt to hide behind their employees. The government submits that STRUBE should be sentenced to a prison term of at least one year. The government has been advised that the Terminal Island prison in this district has adequate facilities to deal with STRUBE's health problems.

Additionally, STRUBE, who is a wealthy man, deserves a substantial fine as further punishment. After all, STRUBE's profits were largely made as a result of the fraudulent conduct of his company. The government submits that the maximum fine of $1,125,000 is appropriate as to STRUBE.

* * *

(2)

No. 89-1643

Supreme Court, U.S.
FILED
JUN 8 1990
JOSEPH F. SPANIOL, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

GORDON STRUBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion when it refused to allow petitioner to withdraw his guilty plea on the basis of an alleged violation of his plea agreement.

2. Whether petitioner was properly convicted, upon his guilty plea, of acting as an accessory after the fact.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 14a-24a) is unpublished, but the decision is noted at 888 F.2d 130 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1989. A petition for rehearing was denied on January 23, 1990 (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on April 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Central District of California to three counts of acting as an accessory after the fact to offenses committed by the corporation of which he is the chief executive officer and by one of the corporation's employees, in violation of 18 U.S.C. 3. The underlying offenses were one count of making a false claim upon an agency of the United States (18 U.S.C. 287) and two counts of making false statements in a matter within the jurisdiction of an agency of the United States (18 U.S.C. 1001). Petitioner was sentenced to six months' custody in a community treatment center, to be followed by five years' probation, and was fined $300,000.

1. Petitioner is the founder and chief executive officer of Consolidated Aeronautics Corporation (CAC). In 1987, a grand jury began an investigation into CAC's sales of aircraft parts to the United States government in 1985 and 1986. Pet. App. 15a.

Ultimately, CAC, Ronald Guy (a CAC vice president), and petitioner entered into a plea agreement with the United States, under which petitioner agreed to plead guilty to three counts of a five-count information. The information charged CAC and Guy (1) with conspiring to defraud the United States by entering contracts to sell the government new and unused military aircraft parts and then supplying used, reconditioned, and refurbished parts instead, and (2) with various false certifications and claims for payment in connection with the contracts. Each of the counts in which petitioner was charged alleged that, acting with knowledge that a particular false statement or false claim had been made, petitioner "relieved, comforted

and assisted" CAC and Guy "in order to hinder and prevent their apprehension, trial and punishment." Pet. App. 15a-16a, 32a-38a. In exchange for the defendants' guilty pleas, the government agreed not to bring any additional criminal charges against CAC or its officers and employees. The plea agreement also provided that "[a]s to [petitioner], the government will not recommend at the time of sentencing a total period of incarceration of more than one year." Pet. App. 15a-16a, 40a-41a.

a. At the plea proceeding, in accordance with Fed. R. Crim. P. 11(f), the district court inquired into the factual basis for each defendant's plea. The prosecutor represented that the government's evidence would show an "overall conspiracy" consisting of "a pattern with some of the contracts of Consolidated Aeronautics Corporation to supply reconditioned, refurbished, remanufactured and on occasion used parts when government contracts called for the supply of new and unused parts." Pet. App. 61a. CAC, the prosecutor continued, would also falsely certify that the parts supplied were in compliance with the contract and would submit claims for payment that were false for the same reason. *Ibid.* With respect to petitioner, the prosecutor stated (*id.* at 63a):

> [Petitioner] – and I think the factual basis will be expanded on by [petitioner's attorney and petitioner] – knew what was going on at the time and did nothing to stop this particular pattern; indeed, assisted by lack of action and lack of intent to put an end to this particular path and, therefore, in the government's view, could be found guilty of 18 USC Section 3 in connection with the false statement [charged in Count 2 of the information].

The prosecutor relied upon the same theory of culpability with respect to the other two counts to which petitioner offered guilty pleas. *Id.* at 64a.

Petitioner's attorney disputed the prosecutor's account on two points. He denied that petitioner knew about the substitution of parts and the false certifications at the time, and he denied that petitioner "participated in the conduct as alleged in the Information – the substantive conduct as alleged in the Information." Pet. App. 65a. Rather, according to petitioner's counsel, petitioner "did not know of the [illegal] conduct at the time, nor did he actively participate in the conduct." *Ibid.* However, counsel continued, petitioner "did learn of the events that [the prosecutor had] recited and which appear in the Information" and "failed to bring them to the attention of the authorities – either the investigating authorities or the Government contracting officer who had cognizance of these contracts." *Id.* at 66a. Petitioner's attorney concluded, "I believe that constitutes a violation of [18 U.S.C. 3]." *Ibid.* Petitioner subscribed to his attorney's account, which was also recorded in a written submission executed by petitioner and his attorney.[1]

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[1] Defendants' Factual Basis for Guilty Plea to Information (filed May 9, 1988) [hereinafter *Defendants' Factual Basis*]. Consistent with the oral representations of petitioner's attorney, this submission asserted that petitioner had no contemporaneous involvement in the underlying offenses to which he acted as an accessory (*id.* at 2-3):

> In approximately January 1986 and later, [petitioner] learned from other officers of CAC who had primary responsibility for the U.S. Government contracting business that CAC had supplied "newly manufactured material" to the government in connection with certain "selector set" contracts even

Drawing upon the accounts of both the prosecutor and petitioner's attorney, the district court found a factual basis for petitioner's guilty plea (and those of the co-defendants) "on the basis of, one, the proffer made by [the prosecutor]; two, as qualified by various counsel as to parts of their proffer to which they disagree; and, three, including the factual basis as set forth in the pleading just filed by the defendants." Pet. App. 69a.

b. Prior to petitioner's sentencing, the government filed a sentencing memorandum, in which it recommended a sentence for each of the defendants. In an introduction, the memorandum made the following recommendation for petitioner (Pet. App. 71a):

> For the reasons set forth more fully herein, the government recommends the following sentences:
>
> * * * * *
>
> [Petitioner]: A jail sentence of one year and a fine of $625,000[.]

After a discussion of the facts, the memorandum also stated (*id.* at 16a, 73a):

> It is submitted that CAC's long ingrained practice of selling defective parts was known to and orchestrated by [petitioner]. But for his age and health, a long prison sentence would be called for.

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though the contract specifications called for the material to be "new, unused surplus." Further, [petitioner] learned at that time that certifications had been submitted to the government by CAC personnel which falsely affirmed that the product supplied was "new, unused surplus," when, as [petitioner] learned after the fact, the product was "newly manufactured" material. (This applies to the contracts referred to in counts two, three and five of the Information.)

> Nevertheless, some prison is warranted to deter [petitioner] and other corporate executives who attempt to hide behind their employees. The government submits that [petitioner] should be sentenced to a prison term of at least one year.

Petitioner moved to withdraw his guilty plea, contending that the sentencing memorandum's use of the phrase "at least one year" violated the government's promise in the plea agreement not to recommend "a total period of incarceration of more than one year." Pet. App. 16a. The district court rejected this contention, finding that the memorandum recommended only one year of incarceration. The court explained that it understood the sentencing memorandum to acknowledge "that while [the prosecutor] can't recommend more, he is going to recommend one year. That is what I believe and that is the way I interpreted it." *Id.* at 28a. The court added that even if there had been a breach of the agreement, the proper remedy would have been to resentence petitioner before another judge, not to allow him to withdraw the plea. *Ibid.* In seeking to withdraw the plea, petitioner did not challenge the sufficiency of the information, argue that he had not committed the offenses with which he was charged, or challenge the factual basis for his guilty plea.

The court sentenced petitioner to serve six months in a community treatment center. The court also imposed a five-year term of probation, a community service obligation, and fines totalling $300,000. Pet. App. 29a-31a.

2. On appeal, petitioner argued that he should have been permitted to withdraw his guilty plea (1) because the factual basis elicited during the plea

proceeding did not establish that he had committed any affirmative act to assist the other defendants in attempting to avoid detection, and (2) because the prosecutor's sentencing memorandum violated the plea agreement. The court of appeals rejected these contentions and affirmed. Pet. App. 14a-24a.

With respect to the sufficiency of the factual basis for the plea, the court found that the record before the district court justified the conclusion that after learning of his employees' illegal activity, petitioner had engaged in "obstruction of justice by providing a safe harbor for the criminal action and concealing their ongoing crimes for personal or corporate profit." Pet. App. 20a. The court of appeals concluded that the district court had "faithfully complied with the requirements of Rule 11(f)." Pet. App. 21a.

The court of appeals also rejected petitioner's claim that the government had breached the plea agreement. The court noted that the district court "construed the prosecutor's recommendation, as clarified by his oral statements, as being in compliance with the terms of the plea agreement." Pet. App. 23a. The panel also upheld the district court's understanding of the intent of the agreement – *i.e.*, that "the prosecutor could not recommend more than one year, but was free to argue that the sentence should not be less than one year." *Id.* at 24a. The court of appeals held that the district court had not abused its discretion when it denied petitioner's motion to withdraw his guilty plea. *Ibid.*

ARGUMENT

1. Petitioner seeks further review of the questions whether the government is obligated to "comply with the literal terms of plea agreements" and whether the government may seek to "cure its breach of a plea agreement" after the defendant has moved to withdraw his plea. Pet. i. On the facts as found by the lower courts, neither of these questions is properly presented. The district court concluded that the government had not breached the plea agreement, explaining that the prosecutor had "acknowledge[d] that while he can't recommend more, he is going to recommend one year." Pet. App. 28a. The court of appeals upheld the trial court's determination that the plea agreement permitted that type of recommendation. *Id.* at 24a. The correctness of the district court's determination that the sum and substance of the prosecutor's recommendation was "one year and no less" as opposed to "one year or more" presents no issue calling for this Court's review.

Even though the sentencing memorandum stated at one point that petitioner "should be sentenced to a prison term of at least one year" (Pet. App. 73a), it would have been unreasonable for the district court to conclude from the memorandum as a whole that the government was recommending more than one year's incarceration. The same memorandum also clearly stated that the government was recommending "[a] jail sentence of one year" for petitioner. Pet. App. 71a. Moreover, when it received the sentencing memorandum, the district court was well aware that petitioner's plea agreement obligated the government not to "recommend at the time of sentencing a total period of incarceration of more than one year." *Id.* at 40a. Under these circumstances, the court sensibly refused

to interpret the memorandum in the manner the petition advocates – *i.e.*, to embody two separate and inconsistent recommendations, one of which would violate the plea agreement. Instead, the court read the phrase "at least one year" to express the government's position that petitioner should be sentenced to serve one year of imprisonment and no less. That interpretation was fully consistent with all of the statements in the sentencing memorandum as well as the plea agreement.[2]

In response to petitioner's motion to withdraw his plea, the prosecutor confirmed that it was his intention to recommend a prison term of one year, and he offered to delete the words "at least" from the memorandum. See Pet. App. 23a. As the court of appeals noted, the prosecutor's response to the motion simply "clarified" his recommendation (*ibid.*) – by removing any possible doubt as to the intent of the sentencing memorandum. The prosecutor did not concede that the sentencing memorandum breached the plea agreement,

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[2] That interpretation was also supported by the context in which the words "at least one year" appeared. Shortly before, the memorandum argued that "[b]ut for [petitioner's] age and health, a long prison sentence would be called for" and that "some prison is warranted." Pet. App. 73a. As the district court suggested, the clear implication was that the government was arguing for "some prison" (*i.e.*, one year) and emphasizing that this recommendation took account of petitioner's poor health.

A district court's determination of the terms of a plea agreement is a finding of fact that may be reversed only for clear error. See *United States* v. *Barrett*, 890 F.2d 855, 863-865 (6th Cir. 1989); *United States* v. *Caporale*, 806 F.2d 1487, 1516 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987); *United States* v. *Sutton*, 794 F.2d 1415, 1423 (9th Cir. 1986); *United States* v. *Khoury*, 755 F.2d 1071, 1073 (1st Cir. 1985).

and he therefore did not seek to cure any such breach. When the district court pronounced sentence, petitioner received all that he had coming under the agreement – sentencing by a judge who understood that the government was recommending no more than one year of incarceration.

The court of appeals' decision presents no issue of general importance calling for this Court's review. In particular, contrary to petitioner's contention (Pet. 13-17), it does not conflict with decisions of other courts of appeals holding that the government is obligated to comply with the terms of a plea agreement. The court of appeals acknowledged that the government "must be held to the literal terms of the [plea] agreement," Pet. App. 22a, but simply chose not to disturb the district court's determination that the government's sentencing recommendation complied with the terms of the agreement. Other courts of appeals have also refused to reverse convictions on similar facts. See *United States* v. *Januszewski*, 777 F.2d 108, 109-111 (2d Cir. 1985) (government's agreement to recommend a sentence "not to exceed six years" was not violated by prosecutor's statement that "*nothing less than* six years would be an appropriate disposition"); *United States* v. *Bullock*, 725 F.2d 118, 118-119 (D.C. Cir. 1984) (government's recommendation in presentence memorandum of sentence of "at least" 10 to 30 years did not necessitate reversal of conviction, notwithstanding plea agreement under which the government undertook not to request sentence exceeding 10 to 30 years).

The question whether a defendant may withdraw a plea of guilty prior to sentencing is "committed to the sound discretion of the trial court." *United States* v. *Navarro-Flores*, 628 F.2d 1178, 1183 (9th Cir. 1980);

see *United States* v. *Pitino*, 887 F.2d 42, 46 (4th Cir. 1989); *United States* v. *Boyd*, 610 F.2d 521, 524 (8th Cir. 1979), cert. denied, 444 U.S. 1089 (1980). The district court did not abuse its discretion in this case when it denied petitioner's motion for leave to withdraw his guilty plea.[3]

2. Petitioner also contends that the record will not sustain his convictions for acting as an accessory after the fact, in violation of 18 U.S.C. 3. Pet. 21-28.[4] He argues that the information was defective because it charged him with misconduct occurring during the commission of the underlying offenses and that the court of appeals upheld his conviction on the same basis. *Id.* at 9-10, 13, 21 n.5, 23. As petitioner concedes, this issue was not presented to either of the lower courts. *Id.* at 21 n.5.

a. Because petitioner did not challenge the sufficiency of the information in the district court, he has

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[3] Even if the district court had erred in its conclusion that there was no breach of petitioner's plea agreement, the choice of the appropriate remedy would be a matter within that court's discretion. See, *e.g.*, *United States* v. *Moscahlaidis*, 868 F.2d 1357, 1363 (3d Cir. 1989); *United States* v. *Tobon-Hernandez*, 845 F.2d 277, 280-281 (11th Cir. 1988); *United States* v. *Bowler*, 585 F.2d 851, 856 (7th Cir. 1978). Cf. *Mabry* v. *Johnson*, 467 U.S. 504, 510-511 n.11 (1984). In this case, the district court has determined that the proper remedy would be resentencing. Pet. App. 28a.

[4] That statute provides, in pertinent part:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

waived any objection to its terms other than "that it fails to show jurisdiction in the court or to charge an offense." Fed. R. Crim. P. 12(b)(2); see Fed. R. Crim. P. 12(f). Moreover, in determining whether the information sufficiently charges a violation of 18 U.S.C. 3, the information must be liberally construed in favor of validity. Because petitioner failed to challenge it on a timely basis, his convictions should not be reversed "unless the [information] cannot within reason be construed to charge a crime." *United States* v. *Vanover*, 888 F.2d 1117, 1120 (6th Cir. 1989). Accord, *e.g.*, *United States* v. *Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); *United States* v. *Rivera*, 879 F.2d 1247, 1251 n.3 (5th Cir.), cert. denied, 110 S. Ct. 554 (1989); *United States* v. *Phillips*, 869 F.2d 1361, 1364-1365 (10th Cir. 1988), cert. denied, 109 S. Ct. 2074 (1989); *United States* v. *Mallen*, 843 F.2d 1096, 1102 (8th Cir.), cert. denied, 488 U.S. 849 (1988); *United States* v. *Johnson*, 805 F.2d 753, 758 (7th Cir. 1986).

The information in the case clearly satisfied that standard. Each count to which petitioner pleaded guilty alleged that CAC and one of its officers submitted a false certification or false claim to the government and that petitioner, "knowing that the [underlying] offense *had been committed*, received, relieved, comforted and assisted [the co-defendants] in order to hinder and prevent their apprehension, trial and punishment." Pet. App. 35a-38a (emphasis added). None of these counts can fairly be read to allege that petitioner assisted his co-defendants, if at all, only in their commission of the underlying offenses, and each of them adequately set forth all the elements of the offense of acting as an accessory after the fact. See *Hamling* v. *United States*,

418 U.S. 87, 117 (1974). Read in its entirety and "construed according to common sense," see *United States* v. *Normandeau*, 800 F.2d 953, 958 (9th Cir. 1986), the information charged that, after becoming aware that the underlying offenses "had been committed," petitioner subsequently assisted the principals in their attempt to avoid detection.[5]

b. Neither of the lower courts acted upon the misconception that petitioner could be convicted of

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[5] The fact that the information alleged that the underlying offenses had been committed in the district "[o]n or about" particular dates and that petitioner had acted as an accessory "[a]t said time and place" (Pet. App. 35a-37a) does not suggest that the information cannot reasonably be construed to charge a crime. Cf. *United States* v. *Beebe*, 792 F.2d 1363, 1366 (5th Cir. 1986) ("indictment's validity is determined by a practical, not technical, reading of the indictment as a whole"); *United States* v. *Gironda*, 758 F.2d 1201, 1209 (7th Cir.) (in reviewing sufficiency of indictment, court must "consider the challenged count as a whole and * * * refrain from reading it in a hypertechnical manner"), cert. denied, 474 U.S. 1004 (1985). The information plainly alleges that petitioner was being prosecuted because of what he did "knowing that [each underlying] offense had been committed" (Pet. App. 35a-37a).

In addition, it is well established that a charging instrument's allegations regarding the date that a crime has been committed are not material unless time is an essential element of the offense; thus, proof that an offense occurred at a point in time different than that alleged ordinarily does not constitute a variance requiring reversal of a conviction. See, *e.g.*, *United States* v. *Young*, 862 F.2d 815, 818-819 (10th Cir. 1988); *Russell* v. *United States*, 429 F.2d 237, 238 (5th Cir. 1970); *United States* v. *Covington*, 411 F.2d 1087, 1088-1089 (4th Cir. 1969). *A fortiori*, in view of petitioner's failure to challenge the information, any defect in its allegations as to time cannot now be invoked as the basis for reversing his convictions.

acting as an accessory based solely upon assistance in the commission of the underlying offenses. In finding a factual basis for petitioner's guilty pleas, the district court drew upon the submissions of both the prosecutor and petitioner's counsel – *i.e.*, the prosecutor's proffer "as qualified by various counsel as to parts of [the] proffer to which they disagree * * * including the factual basis as set forth in the pleading just filed by the defendants" (Pet. App. 69a).[6] Although the district court did not specify the precise set of facts on which it relied in accepting the plea, its express reference to petitioner's version of his activities forecloses any contention that the plea was accepted on the basis of

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[6] Fed. R. Crim. P. 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Under the express terms of this rule, the factual basis for petitioner's plea need not be drawn solely from his or his attorney's admissions on the record, but may include the prosecutor's proffer and sentencing memorandum, the presentence report, and the remainder of the record. See, *e.g.*, *United States* v. *Montoya-Camacho*, 644 F.2d 480, 485-486 (5th Cir. 1981).

Moreover, even if the record prior to the entry of judgment upon petitioner's pleas were insufficient to establish a factual basis, petitioner would not thereby be entitled to withdraw the plea. Because petitioner has never contended that his plea was other than knowing and voluntary, the appropriate remedy for any inadequacy in the factual basis shown upon the record would be a remand to the district court to enable that court to determine whether on a more complete record a factual basis could be shown. See *United States* v. *Allen*, 804 F.2d 244, 248 (3d Cir. 1986), cert. denied, 480 U.S. 922 (1987); *United States* v. *Goldberg*, 862 F.2d 101, 106-108 (6th Cir. 1988).

petitioner's having aided and abetted the commission of the underlying offenses.

The central theme of petitioner's submission, epitomized by the written factual basis he filed with the court, was that petitioner's misconduct postdated the submission of the relevant false statements and claims (*Defendants' Factual Basis* 2-3 (emphasis added)):

> In approximately January 1986 and later, [petitioner] learned from other officers of CAC who had primary responsibility for the U.S. Government contracting business that CAC *had supplied* "newly manufactured material" to the government in connection with certain "selector set" contracts even though the contract specifications called for the material to be "new, unused surplus." Further, [petitioner] learned *at that time* that certifications *had been submitted* to the government by CAC personnel which falsely affirmed that the product supplied was "new, unused surplus," when, as [petitioner] learned *after the fact*, the product was "newly manufactured material."

Petitioner's plea was not offered or accepted on the assumption that he violated the law, if at all, only in the commission of the underlying offenses themselves.

Nor was the court of appeals' affirmance based upon such a theory of criminal culpability. On appeal, petitioner contended that the factual basis for his plea was inadequate *only* because the record did not establish that he had committed an affirmative act in assisting his co-defendants to conceal their offenses. See Pet. App. 6a. The court rejected that contention, but it did not hold that petitioner had provided assistance, if at all, only in the commission of the offenses themselves. Rather, it noted that the prosecutor had

been prepared to prove that "with knowledge that his codefendants *had filed prior false claims*, [petitioner] permitted his employees to continue to file false claims." *Id.* at 7a (emphasis added). Petitioner's guilty plea was valid, the court of appeals concluded, because "the [district] court's inquiry adequately established that [petitioner] had knowledge of the offenses with which he was charged, that he comforted and assisted his employees in continuing to file false claims *after he had knowledge of their prior illegal activity*, and that he understood the consequences of his plea." *Id.* at 8a (emphasis added).

There is thus no support whatever for petitioner's assertion (Pet. 23) that "[t]he facts as found by the Court of Appeals establish that petitioner's acts upon which the plea was taken all occurred *before* the completion of the underlying offenses." Nor did the court find "that petitioner had assisted the company and its employee during the commission of their offenses" (*ibid.*). The court's unpublished memorandum opinion does not extend the offense of acting as an accessory

after the fact and thus does not call for this Court's review.[7]

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[7] According to the prosecutor's proffer, the conspiracy alleged in Count 1 continued through the end of October 1987. Pet. App. 60a. The substantive offenses as to which petitioner was alleged to have served as an accessory after the fact were committed on April 9, 1985 (Count 2), March 20, 1986 (Count 5), and April 4, 1986 (Count 3). The written factual basis filed on petitioner's behalf represented that he had learned of CAC's illegal activities "[i]n approximately January 1986 and later." *Defendants' Factual Basis* 2. These facts (together with the prosecutor's proffer and other materials in the record) justify the conclusion that petitioner became aware of each false statement or claim in turn and acted as an accessory in the manner described by that court. The accessory statute "makes no exception for persons who are present at the scene of the crime, or who may have participated in the planning or execution of the offense." *Smith* v. *United States*, 306 F.2d 286, 287 (D.C. Cir. 1962). Cf. *United States* v. *Van Scoy*, 482 F.2d 347, 349 (10th Cir. 1973) (upholding conviction for acting as an accessory after the fact to bank robbery upon indictment which charged defendant with that offense and aiding and abetting the same robbery); *United States* v. *Day*, 533 F.2d 524 (10th Cir. 1976), cert. denied, 444 U.S. 902 (1979). Thus, the factual basis for petitioner's guilty pleas was not undercut by the possibility that the record could also have warranted an inference that he participated in the commission of the underlying offenses. A defendant who agrees to plead guilty to acting as an accessory after the fact – a lesser offense than aiding and abetting that carries distinct advantages for the defendant in terms of sentencing and other matters – should not be permitted to argue that any ambiguities in the record must be resolved in favor of the more serious offense to which he did not plead guilty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 89-1643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GORDON STRUBE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM

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REPLY MEMORANDUM

The arguments advanced by the Government, like petitioner's conviction, do violence to this Court's jurisprudence, to ordered justice, and to the English language. The Government does not dispute that the decision below cannot be reconciled with multiple decisions of other Circuits or that the questions presented are frequently recurring. Certiorari should be granted to resolve these inter-circuit conflicts and to affirm the continuing vitality of *Santobello* v. *New York*, 404 U.S. 257 (1971). In the alternative, the conviction should be summarily vacated so that this 71 year old petitioner can put the Government to its proof at a trial under an indictment or information that actually charges an offense against the laws of the United States.

1. As in the Court of Appeals, the Government does not expressly disavow in this Court its use of the phraseology "at least one year" in the sentencing memorandum by which it transmitted to the District Court the very signal which, in the plea bargaining process, it had solemnly promised not to send. Nor does the Government suggest that that phraseology means anything other than what petitioner contends.[1] Instead, the Government defends the use of such language by the AUSA below and, by clear implication, the use of similar language by prosecutors in the

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[1] Perhaps to make the Court believe that this illicit signal was not received by the District Court, the Government insists that petitioner was sentenced "to six months custody in a community treatment center," Br. in Opp., at 2; the Government nowhere acknowledges that petitioner was in fact sentenced to two years of imprisonment and that its illicit signal was therefore heard and, on the face of it, acted upon by the District Court.

literally thousands of criminal cases which are disposed of each year by plea bargains. As the Government insists, the "prosecutor did not concede that the sentencing memorandum breached the plea agreement. . . ." Br. in Opp., at 9-10. The Government's defense of the AUSA's actions in this Court, however, has ramifications far beyond this case.

Refusing to acknowledge this plain error, the Government takes the Court on a journey into the mind of the sentencing judge. Thus, "it would have been unreasonable for the district court to conclude from the [sentencing] memorandum as a whole that the government was recommending more than one year's incarceration," Br. in Opp., at 8, and "the district court was well aware that petitioner's plea obligated the government not to 'recommend at the time of sentencing a total period of incarceration of more than one year.' " *Id.* Indeed, the Court is told to take comfort because petitioner was assertedly "sentenc[ed] by a judge who understood that the government was recommending no more than one year of incarceration." *Id.*, at 10. The Government's position is wide of the mark in two related and critical respects.

First, the Government's snapshot of the District Court's state of mind is drawn from information which reached that court *after* petitioner had moved to withdraw his guilty plea. If, as the Government otherwise insists, the AUSA "did not seek to cure any . . . breach" of the plea agreement, Br. in Opp., at 10, then all the information communicated by the Government to the sentencing court after the filing of petitioner's Rule 32(d) motion and relied upon extensively by the Government in its opposition to that

motion and in this Court was and is irrelevant to the point at issue. Either there was a breach of the plea agreement upon submission of the Government's sentencing memorandum or there was, as the Government asserts, no breach at all and therefore nothing to "cure." Other than the language of the sentencing memorandum itself, no surer evidence of the Government's violation of the plea agreement is available than the AUSA's attempts at the sentencing hearing to recall the breaching language—attempts recounted in full by the Government in this Court for no apparent reason other than to persuade the Court that the AUSA was, after all, well-intentioned. The sentencing memorandum is, however, the best evidence of the Government's intent.

Second, and as petitioner has previously demonstrated, Pet., at 18-20, the irreducible teaching of *Santobello* v. *New York*—which the Government neither cites nor attempts to distinguish—is that a guilty plea cannot stand where its only foundation is conjecture regarding how the sentencing judge may have been affected by the prosecutor's illicit sentencing recommendation.[2] *Santobello* fashioned a broad, pro-

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[2] The Government seeks refuge in the fact that the "Introduction" to the sentencing memorandum stated that the Government was recommending "[a] jail sentence of one year for petitioner." Br. in Opp., at 8. Under the Government's logic, a sentencing memorandum which had later recommended a sentence of "at least two years"—precisely the sentence imposed in this case—would be equally invulnerable to challenge. It is apparently the Government's position that so long as the AUSA gets it right at some point in the sentencing memorandum, it makes no difference that elsewhere he got it wrong. It is absurd to suggest that any defendant would ever plea bargain with the Government if the Government's cavalier view

phylactic rule—never since questioned by this Court—under which the Government must keep its promises irrespective of whether its failure to do so may have had, in retrospect, an impact on the sentence imposed by the sentencing court.

Without denying that the decision below cannot be reconciled with decisions of the Third, Fifth, Seventh and Eleventh Circuits discussed in the Petition, at 14-17, the Government counters that the decision below *is* consistent with decisions of the Second, Fourth, Eighth and D.C. Circuits, Br. in Opp., at 10-11. Nowhere does the Government explain to the Court why such a recurring question is not worthy of plenary consideration where four Circuits would have sustained petitioner's challenge while five Circuits would, at least according to the Government, not do so. It is apparent that the Government asserts the right to make sentencing recommendations in its sentencing memoranda in plea bargain cases which are manifestly not in literal compliance with the promises made by the Government in the underlying plea agreements. In asserting this extraordinary right in this Court, the Government, Br. in Opp., at 10, relies upon cases such as *United States* v. *Bullock*, 725 F.2d 118 (D.C. Cir. 1984) (per curiam), in which the same "at least" phraseology was used by the Government in its sentencing memorandum. What the Government fails to point out is that while the *Bullock* court upheld the denial of the defendant's *post-sentencing* motion to withdraw his guilty plea, the Court of Appeals expressly "admonish[ed] the government to avoid oc-

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of its obligations as stated to this Court was disclosed to defendants in advance.

casions for questioning its meticulous adherence to the terms of a plea bargain." *Id.*, at 119.

In *Bullock*, the Court of Appeals accepted the teaching of *Santobello*, noted the District Court's finding of probable prejudice to the Government in allowing withdrawal of the guilty plea, and told the Government to avoid such mistakes in the future. 725 F.2d, at 119. By relying on *Bullock*, the Government asks this Court to sanction a practice condemned by *Bullock* and at least one other case relied upon by the Government[3] and to do so in the absence of any finding by the courts below of prejudice to the Government in a case in which the defendant asserted his innocence prior to sentencing and demanded that the Government be put to its proof at trial. Were the Court to accept the Government's invitation by denying review of this case, the Government may be expected to continue its evidently widespread practice of systematically ignoring *Santobello*.

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[3] As in *Bullock*, the Second Circuit affirmed the defendant's conviction in *United States* v. *Januszewski*, 777 F.2d 108 (2d Cir. 1985), another case relied upon by the Government, Br. in Opp., at 10, only after it had found that the Government's use of the phrase "nothing less than six years" in its oral argument at the sentencing hearing "violated the spirit of the plea agreement." *Id.*, at 110. The Second Circuit went on to criticize the AUSA for giving "inadequate consideration of the extent of the government's obligations under the [plea] agreement." *Id.*, at 111. *Bullock* and *Januszewski* appear to stand for nothing more than the proposition that the Courts of Appeals are willing to tolerate violations of *Santobello* under the false impression that the Government will respond to their criticism of its failure scrupulously to implement *Santobello* in particular cases. The Government's position in the case at bar in this Court is testimony to the fact that it has no intention of reining in its prosecutors and directing them in no uncertain terms to comply with *Santobello*.

The Government also contends in a footnote, Br. in Opp., at 11 n.3, that, even if the District Court erred in finding that the plea bargain had not been breached, this Court need not be concerned because the appropriate remedy was for the District Court to choose and that court stated in dictum that resentencing—not withdrawal of petitioner's guilty plea—was the appropriate remedy for the breach.[4] But as petitioner demonstrates, Pet., at 18-22, the Due Process Clause as interpreted in *Santobello* requires that a defendant be allowed to withdraw his guilty plea in such circumstances, at least in the absence of a showing by the Government of substantial prejudice.[5]

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[4] In footnote 3 of its opposition, the Government cites *United States* v. *Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989), in support of its argument that the appropriate remedy is within the discretion of the District Court. In that case, the defendant specifically requested resentencing before a different judge rather than withdrawal of his guilty plea. In any event, the point is not that district courts have some discretion in providing a remedy for the Government's breach of a plea agreement. The point is whether *Santobello* established a presumption in favor of the remedy chosen by the defendant absent a showing of substantial prejudice by the Government. In this case, the District Court never exercised whatever discretion it possessed on this issue because it erroneously found that the plea agreement had not been breached.

[5] Unlike its position in the courts below, the Government does not argue in this Court that allowing petitioner to withdraw his plea on the basis of his Rule 32(d) motion would have prejudiced the Government. This omission by the Government is apparently an attempt to avoid paying even lip service to the Court's decision in *Santobello*, which the Government rather plainly does not accept but which the Government declines to challenge forthrightly. If the Court does not intervene in this case, the Government will undoubtedly continue its policy of ignoring *Santobello* and the warnings of the Courts of Appeals (such as the *Bullock* court). The plea bargain process is too

Once again the Government's position evidences an open disregard for *Santobello* and an intent to flout its teaching unless and until this Court intervenes. The Government overreaches, and does so in an area of the criminal justice system which has been nurtured by this Court as one deserving of special protection because of the enormous power exercised by the Government in the plea bargaining process and the importance of ensuring the workability of the plea bargaining system.

2. The Government's argument that the three counts of the criminal information to which petitioner pleaded charged an offense for which he (or any other person) could have been convicted is based solely on the presence in the three counts of the phrase "knowing that the offense *had been committed*," Br. in Opp., at 12 (emphasis the Government's). That phraseology, however, does nothing more than establish petitioner's *intent*, an element the Government must establish in order to obtain a conviction under 18 U.S.C. § 3. The question petitioner has raised is the entirely different one whether the information charges acts occurring *after* the underlying offenses upon which petitioner's conviction may be sustained. An examination of the information demonstrates that it does not charge such acts and that it is therefore fatally defective.

The three counts for which petitioner was convicted parallel one another, each consisting of two paragraphs. *See* Pet. App., at 35a, 36a, 37a. The first paragraph of each count describes the acts committed

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central to the efficient administration of the criminal justice system to be left unattended by this Court under the circumstances presented by this case, especially given the position taken by the Government.

by the other defendants—not petitioner—and states that these acts occurred "[o]n or about" certain dates. Petitioner does not suggest—as the Government implies, Br. in Opp., at 13 n.5—that some variance between these alleged dates and the actual dates on which the *underlying* offenses were committed could require reversal of *his* conviction. Rather, petitioner's contention is that the fatal defect in the information is that in each of the second paragraphs of the three pertinent counts, the information charges petitioner with violating 18 U.S.C. § 3 on the basis of acts alleged to have occurred "[a]t said time"—the same time—as the underlying offenses. No matter what date might have been plugged into the first paragraph of the three counts, the result is the same: the information charged petitioner with acts taken *at the same time as* the underlying crimes were committed by the principals. Contrary to the Government's assertion in its footnote 5, this timing is critical because it is simply impossible to be an accessory after the fact on the basis of acts committed simultaneously with the underlying substantive offenses.

3. *Conclusion.* Given the implications of *Santobello* v. *New York* for this case, the Government's refusal to explain to the Court where it stands with regard to *Santobello*'s requirements is telling. This is not just another case on this Court's docket in which a rule has been broken, an injustice done. It is, rather, irrefutable evidence that the Government regards itself as unconstrained by the holding of *Santobello* and is confident that the understandable reluctance of the Courts of Appeals to disturb convictions based upon guilty pleas will make the price of the Government's systematic intransigence low enough to be tolerable

over the long term. Petitioner has been deprived of his right to put the Government to its proof at trial, as cherished a right as exists in our criminal justice system. The prosecutorial policy which led to this denial should be subjected to plenary review by this Court.

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Respectfully submitted,

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